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Contents

MAY, 1949

In This Issue

Judge Metzger's Struggle with the Military

The Japanese attack on Pearl Harbor made American soil a combat zone for the first time since the Civil War. Military law was proclaimed in the Territory, military courts were established to supersede the civil judiciary and the writ of *habeas corpus* was suspended by the Military Governor. In this article, Judge Claude McColloch describes the conflict between Judge Delbert E. Metzger, United States District Judge for the Territory of Hawaii, and Lt. Gen. Robert C. Richardson, Jr., the Military Governor of the Islands, over the suspension of *habeas corpus*. It is the story of a courageous man standing alone against military law supported by armed force. This story, of which little has been said in the public press, raises the question whether the rights guaranteed by the Constitution can be maintained should American soil again be in danger of invasion. (Page 365.)

The Confusion Created by Courts in Interpreting Tax Statutes

Since 1932, the federal courts have been giving broad interpretation to the language of the federal gift, estate and income tax statutes. Arthur A. Ballantine, former Under Secretary of the Treasury, believes that this attempt by the judiciary to read their own notions of tax justice into the language used by the Congress has resulted in confusion and uncertainty to the taxpayer. In this article, he briefs the case for a return by the courts to the literal language of the statutes. His argument against judicial legislation in the tax field is stimulating and challenging. (Page 369.)

The Place of the Judiciary in the British Constitution

In this article, Sir David Maxwell Fyfe, former Attorney General of the United Kingdom, explains how an independent judiciary is maintained in a country where the power of the legislature is supreme and cannot be overridden by a court finding that it has exceeded the constitutional limits of its authority. The division of legislative and judicial power has been carefully preserved in Britain through centuries of precedent, custom and compromise, and the unwritten British Constitution has achieved the same degree of protection to individual freedom as has our own Constitution. (Page 373.)

The Place of Poetry in the Lawyer's Reading

Like many other Americans, lawyers frequently regard poetry as effeminate and a waste of time. In this article, Ben W. Palmer points out that the art of poetry is a valuable part of a lawyer's continuing education. Writing in his usual entertaining style, Mr. Palmer cites good and bad poets, and shows how a knowledge of poetry sharpens the legal mind in its search for the *mot juste* in courtroom or brief. Mr. Palmer believes that poetry is essential for maintaining flexibility in thinking, and quotes Darwin's lament on his inability to appreciate Shakespeare after long years of exclusively technical reading. (Page 375.)

Senator McCarran Proposes An Administrative Court

The increase in the number of administrative tribunals of "experts" in fields of the law where highly technical, specialized knowledge is essential can be a serious threat to freedom. Senator McCarran points out that the members of the Second Continental Congress had much the same sort of tribunals in mind when they adopted the tenth complaint against King George III in the Declaration of Independence. In this article, he affirms his belief that bureaus and boards of experts can be fitted into our American pattern of justice, and he cites the Administrative Procedure Act as an example of a step in the right direction. He believes that administrative procedures must be simplified, that they must operate under and in accordance with the law. He proposes as a mechanism of control over administrative agencies, a special court to review administrative actions, and that the parties be given their choice of appeal to the administrative court or to the regular federal courts upon administrative law matters. (Page 379.)

Marshall F. McComb Suggests Shorter Appellate Opinions

Lawyers have long complained that the opinions of many appellate courts are too long and confusing to be used as precedent for future cases. Judge McComb has talked with many members of the profession on the bench, in practice, and in the law schools, and from what he has learned he has set forth a series of rules which judges may find useful in meeting the mandate of the Bar for more lucid decisions. Practicing lawyers will also find many suggestions which may help them in writing briefs. (Page 382.)

History of Lottery Laws in the United States

William E. Treadway describes some of the lotteries authorized and conducted in the early days of the Republic. Far from being regarded as *mala in se* by the founders of the country, lotteries were frequently resorted to as a means of raising revenue. Thomas Jefferson wrote a lengthy defense of lotteries, which Mr. Treadway sets forth in this article. Today lotteries are forbidden by all forty-eight states, and a federal statute forbids sending lottery material through the mails. Mr. Treadway is not arguing for or against lotteries, however. His article is merely an interesting exposition of a subject which is seldom seriously discussed today. (Page 385.)

APPLICATION FOR HOTEL ACCOMMODATIONS FOR THE ANNUAL MEETING OF THE ASSOCIATION, TO BE HELD IN ST. LOUIS, MISSOURI, SEPTEMBER 5-9, 1949, TOGETHER WITH $5.00 REGISTRATION FEE (CHECK TO BE MADE PAYABLE TO THE AMERICAN BAR ASSOCIATION), SHOULD BE ADDRESSED TO THE HOTELS RESERVATION BUREAU, AMERICAN BAR ASSOCIATION.

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Donald Kepner Writes of Local Governments

In this article, which won honorable mention in the 1948 Ross Essay Contest, Professor Kepner examines the nature of the American federal system of government, and finds that, while in theory it remains unimpaired, in practice the states and local governments have surrendered many of their responsibilities to the Federal Government, thus destroying the balance of power set up by the Constitution. The reason for this, he thinks, is that the states have failed to cope with the social and economic problems of our industrial civilization, and that in many cases they have encouraged federal intervention. Congress by exercising fully its taxing powers and its power over interstate commerce has entered into competition with the states. Professor Kepner outlines a program for restoring the power of the state and local governments. (Page 389.)

The Supreme Court and Civil Rights Discussed by W. D. Workman, Jr.

The passage of the Fourteenth and Fifteenth Amendments during the Reconstruction Era raised the problem of the right to vote of the Negro minority in the South. Mr. Workman discusses the recent decisions of the United States Supreme Court which have progressively enlarged the concept of "state instrumentality" insofar as these amendments are concerned. Beginning with *Nixon* v. *Herndon,* decided in 1923, he considers one by one the cases leading up to the recent decision by Judge J. Waties Waring, of the Eastern District of South Carolina, which found that the Democratic party was an agent of the state despite the fact that there was no statute in that state governing the party; from which he concluded that therefore denial of membership in the party was a violation of the Fifteenth Amendment. As a result of this series of cases, Mr. Workman points out that Negroes are now voting in the South for the first time since the Reconstruction. (Page 393.)

American Bar Association 1948-1949

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STATE ADMINISTRATIVE LAW
ESSAY CONTEST

conducted by

SECTION OF ADMINISTRATIVE LAW
AMERICAN BAR ASSOCIATION

ANNOUNCEMENT OF ADDITIONAL PRIZES AND REVISED CONTEST RULES

1. **ELIGIBILITY.** Contest will be open only to members of American Bar Association in good standing, including new members elected prior to August 1, 1949 (except officers of the Section and members of its Council, Chairmen Contest Committee, and State Chairmen), who have paid their annual dues to the Association for the current fiscal year.

2. **SUBJECT.** Each essayist should write about the Administrative Law of the State in which he has been admitted to practice and practices law although reference to the laws of other States for purposes of comparison is permissible if subordinate to the central theme. For purposes of this requirement, teaching of law will be considered "practice". It will be left to the discretion of each essayist whether to review substantially all of the statute and case administrative law of his State or to select one or more important fields of that law for more extended analysis, suggestions and criticisms. Extended discussion of a narrow field not of general interest should be avoided. All statements should be accompanied with citations to sources.

3. **CLOSING DATE.** September 1, 1949—extended from December 31, 1948.

4. **CASH PRIZES.** A first prize of $1500 in cash will be awarded to the writer of the essay selected by the Board of Judges as the best. A second cash prize of $500 will also be awarded for the essay judged to be the second best. These prizes are hereinafter referred to as the "Section Prizes".

5. **STATE PRIZES.** As of this date, Committees in the States listed below will offer a separate State prize to contestants writing about the law of that State. However, essays eligible for the local prize and the "Section Prizes" will be independently judged and inquiries with respect to the rules and regulations relating to local contests should be addressed directly to the Chairmen of the various State Committees, as listed below.

Arizona—Charles H. Woods, College of Law, University of Arizona, Tucson

Arkansas—Joe C. Barrett, McAdams Trust Building, Jonesboro

Colorado—Milton J. Keegan, First National Bank Building, Denver 2

Delaware—Willian Prickett, 404 Equitable Building, Wilmington 7

Illinois—Benjamin Wham, 231 South LaSalle Street, Chicago

Minnesota—Robert M. Bowen, Rand Tower, Minneapolis

Nebraska—John E. Snider, 134 South 12 Street, Lincoln 1

New Hampshire—Frank J. Sulloway, New Hampshire Savings Bank Bldg., Concord

New Jersey—Sylvester C. Smith, The Prudential Insurance Company of America, Newark

New York—Philip J. Wickser, 6 Buffalo Insurance Co.'s Bldg., Buffalo 3

Oregon—Nicholas Jaureguy, 1220 Equitable Building, Portland 4

Pennsylvania—John C. Kelley, 208 Walnut Street, Harrisburg

Texas—James Noel, Gulf Building, Houston 2

Virginia—Thomas B. Gay, 1003 Electric Building, Richmond 12

West Virginia—Hon. Frank C. Haymond, Supreme Court of Appeals, Charleston

6. **PUBLICATION AND COPYRIGHT.** No essay will be accepted if previously published. All rights and title to essays submitted must be deemed the property of the Section. Any copyright to an essay must be assigned to the Section.

7. **MISCELLANEOUS RULES.** Essays eligible for the "Section Prizes" shall be submitted in triplicate, typewritten double space (footnotes or notes following the essay, however, may be single space) on one side of plain white paper, letter size (8½ x 11), and mailed as first-class matter without folding to MISS PATRICIA H. COLLINS, ASSISTANT SOLICITOR GENERAL'S OFFICE, DEPARTMENT OF JUSTICE, WASHINGTON 25, D.C. The transmittal envelope must be postmarked not later than midnight **SEPTEMBER 1, 1949.** Each essayist who intends to submit a paper should promptly notify the Secretary so that an up-to-date list of prospective contestants can be maintained.

Each essay must be restricted to four thousand words, including quoted matter. Citations in the text, footnotes or notes following the essay shall not be included in the computation of words, but excessive use of such material may be penalized by the judges of the Contest. The total number of words on each page of the text should be typed on the bottom of at least one copy. Clearness, brevity of expression and thoroughness of analysis will be taken into consideration.

A contestant may submit more than one essay but each will be judged on its own merits and not more than one prize will be awarded to a contestant. An essay may represent the joint effort of more than one writer provided each writer is an eligible contestant.

There should be no mark identifying the writer on any page of the essay manuscript. Copies of the essay should be sent to the Secretary with a cover sheet identifying the writer and his address, with the title of his essay. The entry will then be assigned a number to be identified and recorded by the Secretary, and will then be forwarded to the judges. After the winners have been chosen, the number of their entries will be certified and their identity revealed to the judges.

Inquiries concerning the Contest should be addressed to Omar C. Spencer, Esquire, Chairman Contest Committee, Yeon Building, Portland 4, Oregon, or to J. Tyson Stokes, Esquire, Co-Chairman Contest Committee, 123 South Broad Street, Philadelphia 9, Pennsylvania.

W. JAMES MacINTOSH, Chairman
Section of Administrative Law,
American Bar Association

March 1, 1949

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Members who wish to bring particular articles in the *Journal* to the attention of non-members can now arrange to have marked copies of the *Journal* sent from Chicago.

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Now It Can Be Told:

Judge Metzger and the Military

by **Claude McColloch** • Judge of the United States District Court at Portland, Oregon

▪ Judge McColloch's accurate and readable article on martial law in Hawaii has both news and historical value. While much has been written on the subject, no one has dealt so fully with the personal aspects of the clash between the military and the judiciary. This Judge McColloch was able to do because he had unrestricted access to District Judge Metzger's files. The chronicler who records this chapter of our national history will find here not only vivid and dependable source material, but the authentic story of a judge who was true to the finest traditions of his office.

WALTER P. ARMSTRONG

▪ In December, 1943, Walter Armstrong, a member of the Tennessee Bar, wrote an article for the AMERICAN BAR ASSOCIATION JOURNAL (29 *A.B.A.J.* 698; December, 1943) that attracted wide attention. The title of the article was "Martial Law in Hawaii". Mr. Armstrong discussed the *Glockner* and *Seifert* cases, which had just been decided in Hawaii, and the crisis which they occasioned. United States District Judge Delbert E. Metzger had fined Lt. Gen. Robert C. Richardson, Jr., Commander of the Hawaiian Department, $5000 for contempt, and the General had retaliated by ordering the Judge to purge the Court's records of the contempt proceedings, under threat of severe counter-penalties. The General passed the order (General Order 31, New Series) against Judge Metzger as Military Governor of Hawaii. (See Appendix 3, page 448.)

Mr. Armstrong's article did not discuss the cases which had preceded *Glockner* and *Seifert*, and, of course, the cases which arose later were new matter. It will be my purpose to deal with the earlier and later cases. The *Dr. Zimmerman* case was earlier (1942), and the *Duncan, White* and *Spurlock* cases were later (1944). The *Duncan* and *White* cases went to the United States Supreme Court, where it was held that the Army had exceeded its lawful authority when it closed the civil courts. *Duncan* v. *Kahanamoku*, 327 U. S. 304 (1946). The *Zimmerman* and *Spurlock* cases were "mooted" by the Army before they could reach the Supreme Court, by releasing the petitioners.[1] The Army was upheld in the Court of Appeals in the *Zimmerman, White, Duncan* and *Spurlock* cases. Citations to the Court of Appeals decisions are given later. The Court of Appeals held that the Army's judgment of what was necessary to be done, following the declaration of martial law by Governor Poindexter on the afternoon of the Pearl Harbor attack, was not reviewable.

Much legal ground was fought over before Judge Metzger and his colleague, Judge McLaughlin, but the space of a single article will not permit consideration of all the legal propositions. I shall put major emphasis on the tremendous clash of personalities—Judge Metzger, on the one side, and General Richardson, who was aided and represented by the Department of Justice, on the other side. I will repeat just enough of what was covered so ably by Mr. Armstrong to show what the battlefield was.

Pearl Harbor Raid Begins Story

On the afternoon of Pearl Harbor, under pressure from General Short, and reluctantly, Governor Poindexter issued a proclamation (prepared in advance by the Army) declaring martial law and suspending the writ of *habeas corpus*. The Governor

1. In regard to the Department of Justice's wartime practice of "mooting" cases, the New York *Journal-American* said (November 13, 1945):

> Under this ruling, the only thing the bureaucrats need concern themselves about, apparently, is to end their impositions before the day when the citizen's appeal comes up for a ruling in the Supreme Court. Up to that day they could do as they liked with the citizen's property or his rights. They could confiscate his property without authority or impose illegal restrictions and regulations upon him for a period of weeks, months or years, but by merely returning the property or lifting the regulations at the opportune time they could prevent his demand for constitutional justice from ever being heard.

The editorial comment above refers to the wartime *Montgomery Ward* case. The editorial is quoted by Edward S. Corwin, *Total War and the Constitution* (1947) 69.

Nation-Wide Pictorial Service

Claude McColloch has been Judge of the United States District Court for the District of Oregon since 1937. He was educated at Stanford and the University of Chicago, and was admitted to the Oregon Bar in 1909.

delegated all normal civilian governmental powers, including judicial powers, to General Short. Thereafter, General Short and his successors in the Hawaiian Command, titled themselves "Military Governor".

At once, General Short ordered the courts to close. The Territorial judges submitted. General Short then set up two forms of military tribunal, one entitled "Military Commission", the other entitled "Provost Court". The Military Commission, composed of Army officers appointed by the Commanding General, was to try "major" offenses; the Provost Courts, each composed of a single judge, likewise appointed by the Commanding General, and in all instances from Army or Navy personnel, were to try all other offenses. The jurisdictional distinction between the two courts seems to have been based on penalties. The Provost Courts could impose fines up to $5000 and imprisonment up to five years. The Military Commission could impose severer sentences, including the death penalty. All penalties were reviewed (by proxy) by the Military Governor, but not on a record. Two death sentences were actually passed by the Military Commission, but they were both commuted.

The Territorial courts were soon permitted to open with restricted powers "as agents of the Military Governor";[2] jury trial and indictment by grand juries were forbidden until March 10, 1943, the effective date of a "compromise" worked out with the Army by the new Governor, Ingram Stainback, and his Attorney General, Garner Anthony. The Department of the Interior and the Department of Justice assisted in working out the "compromise".

But the Army would not compromise on one thing. It insisted on suspension of the writ of *habeas corpus* throughout the entire period of martial law (military government), which was ended by Presidential proclamation October 24, 1944, shortly after President Roosevelt visited Hawaii. Insistence by the Army that the writ of *habeas corpus* should remain suspended was the direct cause of the three major clashes between Judge Metzger and the military.

Judge Metzger's Memorandum on *Zimmerman* Case

As stated, the Territorial courts closed at once, pursuant to the Military Governor's order, but Judge Metzger's court never closed. He takes pride in this.[3]

I shall now quote from a memorandum which I found in the Judge's personal files. It must have been written close to the event, for it speaks with the urgency of the times.

> A day or two prior to the filing of the petition for a Writ (February 19, 1942), counsel for Mrs. Zimmerman had informed the Court that it was their intention to file such a petition [for *habeas corpus*], but in view of General Order No. 57 they did not expect the Court to issue a Writ, and, indeed, thought it would be very unsafe for the Court to do so as the Army Government was then in a high state of nervous tension and would no doubt enforce its General Orders by force of arms and vindictive treatment of anyone who attempted to override them, but stated that if counsel were in a position to show the Ninth Circuit Court of Appeals at San Francisco, or any judge of that Court, that due effort had been made upon a proper showing to obtain a Writ from the U. S. District Court in Hawaii and in such proceeding it was disclosed that the Army had taken over the government of the Territory and had forbidden every court therein to issue such a Writ, they were of the opinion that they could obtain a Writ through the Circuit Court, or a judge of that Court.
>
> On the morning of February 20, 1942, when the petition was presented to the Court for hearing the courtroom was fairly crowded with military personnel, many of whom were officers, ranking from a general down and, as was discovered by the Court upon adjournment, many, if not all, bore sidearms. The halls outside the courtroom, visible from the bench through glass sections in the doors, likewise contained many enlisted soldiers, some of whom were armed with rifles. *The cause of this setting was never inquired into by the Court.*
>
> The petition spoke for itself, no argument for or against it was offered, save the suggestion of the U. S. Attorney that under the existing rules of the Military Governor the Writ could not be issued. The Court disposed of the matter in the following words:
>
> I have read the petition; the petition sets out a case justifying a writ, in my opinion, and in my understanding a writ should issue as a matter of course, as a matter of law, upon this showing. The Court is in the situation here by reason of the Military Governor's Order No. 57, General Order of January 27th, which absolutely forbids the issuance of a writ, by this Court specifically. Now, the situation is just such that it would be in clear defiance of that military order for the Court to issue the writ. I feel that the Court is under duress by reason of the Or-

2. I have heard lawyers say they did not know such things were going on. The censorship kept the news from this country. It seems certain that President Roosevelt signed documents, approving the course of conduct of the military, without being correctly advised.

3. Judge Metzger was appointed to the Territorial Circuit Court (trial court) on the Island of Hawaii on June 18, 1934, for a term of four years. He was reappointed to that Court on June 24, 1938. On August 5, 1939, Judge Metzger was appointed to the United States District Court, term 6 years. He was reappointed on September 28, 1945. Judge Metzger is one of two Judges who have been reappointed to the United States District Court in Hawaii during the forty-nine years of the Court's existence.

Judge Metzger and his many friends are desirous that the Federal District Court in Hawaii be given the status of a constitutional court on a par with the Federal District Courts in the states. See *Mookini v. United States*, 303 U.S. 201, 205.

der, not free to carry on the function of the Court and in a matter which the Court conceives to be its duty; I feel powerless, however, to act without doing so in open defiance of that Order of the Military Governor; and for that reason alone the Court refuses—declines to issue the writ.

Mrs. Zimmerman's counsel elected to take an appeal to the Ninth Circuit Court of Appeals, instead of applying there for a Writ. Dr. Zimmerman was removed by the Army from Hawaii on the evening of February 20th, the day after Mrs. Zimmerman's petition was filed in the Court and the day set for hearing on it. He was shipped first to Fort McDowell on Angel Island in San Francisco Bay and after being detained there for five days was transferred to Camp McCoy, Wisconsin. After a few weeks at Camp McCoy he contacted attorneys who filed a petition for *habeas corpus* for himself and other internees (all citizens) brought from Hawaii and at 9:00 o'clock P.M. of the day of its filing he was, with other Hawaiian internees, moved out of the state and headed back to Hawaii, where he was placed in an internment camp on Sand Island in Honolulu Harbor. Here Zimmerman remained until March 2, 1943 . . . and was then shipped to San Francisco. On March 19, 1943, he was released from internment at San Francisco, with thirty-five cents in his pocket, after being importuned with implied threats to sign a paper designed to have him release all government officers of all liability for damages arising from his internment. This he steadfastly refused to do.

[End of Judge Metzger's file memorandum]

The opinion of the Court of Appeals in this case is at 132 F. (2d) 442 (1942). On full consideration of all that the military had done, and was doing, the Court gave blanket approval to the Army's conduct in Hawaii.

It will be noted that the *Zimmerman* case was a "detention" case. Dr. Zimmerman was a citizen of German ancestry. Judge Metzger might very well have held at that stage of affairs in Hawaii that the Army was justified in detaining the doctor. Compare *Labedz* v. *Kramer*, 55 F. Supp. 25. But the Army would not permit the Judge *to conduct an inquiry into the legality of the detention.*

Petition for *certiorari* was filed in the Supreme Court, but the Army "mooted" the case by releasing Zimmerman on the mainland, as stated in Judge Metzger's office memorandum *supra.*

Glockner and *Seifert* Cases Next in Series

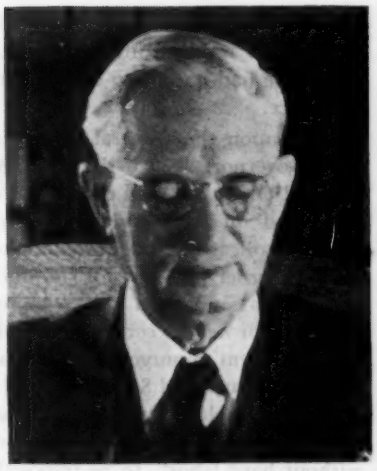
These cases were the subject of Mr. Armstrong's article. General Short had been withdrawn from the Islands (December 17, 1941), and General Emmons had come and gone. Lt. Gen. Robert C. Richardson, Jr., was in command, and the Navy was fighting the Japs 2000 to 2500 miles away. Francis Biddle was Attorney General, Robert Patterson was Assistant Secretary of War. A few members of the Honolulu Bar, chief among them Garner Anthony, had been exerting pressure for restoration of normal civil government, and a new Territorial Governor, Stainback, had been appointed (August 17, 1942).

These were detention cases. Glockner had been "detained" by the Army since December 8, 1941, and Seifert since December 23 of the same year.

Glockner and Seifert petitioned for writs of *habeas corpus.* The United States Attorney appeared for General Richardson, and moved to dismiss the petitions on the same grounds that had been urged in the Court of Appeals in the *Zimmerman* case. Judge Metzger ruled *that circumstances had changed* and announced his intention to issue the writs. Thereupon General Richardson set upon a course of conduct of avoiding service of the writs. On one occasion the military police forcibly restrained the Deputy Marshal from making service on General Richardson while the General strode in plain sight to his automobile. Assistant Secretary Patterson was in Honolulu at the time. After several days the General submitted to service.

Then began the second phase of the historic clash between Judge Metzger and the Army.

General Richardson had obtained



Delbert E. Metzger has been District Judge for the District of Hawaii since 1939. A native of Kansas, he practiced law in Honolulu and Hilo from 1922 to 1934, and served as judge of the Fourth Circuit Court in Hawaii from 1934 to 1939.

a radiogram order from General Marshall forbidding him to produce Glockner and Seifert in court. No doubt he had used the time while avoiding service to obtain this order. The United States Attorney wanted to make a written return for the Military Governor, showing the order by General Marshall and other things, in lieu of producing the bodies of the petitioners. Judge Metzger declined to accept any return without production of the bodies. The Judge stated that he considered *habeas corpus* to be a trial of the legality of the detention, and that the detained persons were entitled to be present (Appendix 2, page 447.) The United States Attorney announced that General Richardson would under no circumstances produce the bodies. Judge Metzger has told me that Attorney General Biddle called him on the telephone and personally urged him to permit General Richardson to make a written return in lieu of producing the petitioners.

As Mr. Armstrong related, Judge Metzger cited General Richardson for contempt. The General disregarded the citation, and the Judge fined him $5000 *in absentia.* Judge Metzger drew the contempt citation

himself. Because the Department of Justice was representing the Army, the Judge had no one to call on for assistance.

Thereupon the General, as Military Governor, issued the famous General Order 31,[4] and caused it to be served on both Judge Metzger and his colleague, Judge McLaughlin. The order not only forbade the Judges to entertain any more petitions for *habeas corpus*, but also required them to purge their records of the Glockner and Seifert proceedings. The penalty for noncompliance was fine or imprisonment, "with or without hard labor", to be imposed by one of the General's Provost Courts; the penalty was to be more extreme (what penalty not stated) if a Military Commission took jurisdiction of the recalcitrant Judges. Judge Metzger was at that time 68 years old. He had soldiered himself. He was a volunteer engineer in the Spanish-American War.

Judge Metzger's opinion holding General Richardson in contempt has never been published, other than in the local newspapers. I quote from it:

> General Richardson has been an officer of the United States in a department under the Executive Branch of the Government for a number of years. There is no doubt but that he took and subscribed to an oath to uphold the Constitution of the United States. He must know, as every citizen should know, that the Government of the United States under the Constitution is divided into three branches. The courts and the judicial arm is one branch. This court is a federal court and possesses all the dignity and power of any trial court of the Nation. Its mandates lawfully made must be performed.
>
> General Richardson has shown open and notorious defiance to the mandate of the court in this particular situation. The Court finds and adjudges him to be guilty of contempt of court and sentences him to pay a fine of five thousand dollars.
>
> The clerk will proceed, with the assistance of the services of the United States Attorney and further process of this Court if necessary, or any other court in the Nation to collect the fine imposed from any property General Richardson has or may have in the future or may be found in his estate.

The contempt judgment was not appealed, but matters stood on the basis of an armed truce until October, 1943, when a Special Assistant to the Attorney General, Edward J. Ennis, and a representative of the Judge Advocate General's office, Col. William J. Hughes, Jr., came out to the Islands. Apparently they were able to get the Military Governor "off his high horse".

Attorneys Ennis and Hughes had the Military Governor rescind Order 31, and at Glockner's and Seifert's "request", they were transported to the mainland and released. With these facts in hand, the Special Assistant appeared before Judge Metzger and asked that the contempt judgment against General Richardson be expunged and the fine remitted. This the Judge declined to do. He reduced the fine to $100, with this statement, not previously published:

> As to General Richardson's motion to vacate the Court's findings that he was in contempt of court in his refusal and failure to respond to the process of the Court, the motion is denied on all grounds, all of which have been carefully considered.
>
> However, the motion presents matters and facts in mitigation of the sentence imposed on the General, to wit, that he was acting and did act under instructions of superior officers in the War Department at Washington in refusing to bring the petitioners before the Court. It is likely true that the Department was not at the time fully advised as to the exact situation; otherwise, I cannot believe General Marshall would have given such instructions. This could have been due to no fault of General Richardson. Indeed, it appears quite certain that he was not competently advised locally.
>
> Courts are reluctant to use the power given them by law to punish for contempt. Punishments are not imposed in a vengeful spirit, but for the purpose of compelling obedience to lawful orders, or preserving decorum and due respect. Proper administration demands that this be done, for without obedience to Court mandates our system of government would perish at once, and without due dignity and respect shown them the Courts would soon lose their great usefulness to the people.
>
> It now appears that the aspect of the circumstance that brought about the heavy fine imposed on General Richardson did not fully portray all the surrounding facts. At the time he was cited for contempt he had a mitigating defense, but it was not presented to the Court because, it appears, his advisors were bent on following a different course.
>
> The Federal statutes demand that the body of a petitioner for a writ of *habeas corpus* shall be brought into Court at the time answer is made by the custodian and evidence offered to substantiate a claim of right to hold custody. The Court may not, after the writ has been issued, hear a respondent custodian unless and until he complies with this requirement of law.
>
> It is fundamentally just that one imprisoned against his will should have an opportunity to face witnesses and hear the reasons asserted in court as a lawful right to hold him. A hearing on the return to a writ of *habeas corpus* is in reality a trial of the petitioner on his legal right to liberty.
>
> Now that the *habeas corpus* cases have been disposed of, the General comes and shows that he was hindered in complying with the Court's mandate by telegraphic instructions from his superior, General Marshall, not to do so. Such instructions do not legally exculpate General Richardson but I consider that they greatly mitigate what appeared at the time to be flagrant willful defiance of and disrespect to the Court.
>
> I am personally convinced that General Richardson is a gentleman of high character, good and firm disposition, and splendid military training, an officer who has attained high rank by merit and is performing service of great value to our Nation in the present war. I am heart and soul with all good citizens in a desire to aid him in his efforts and not to impede or distress him in his war work in any manner, mentally or otherwise. While I cannot wholly absolve him for following the views of General Marshall or others in disregard of Federal law concerning civilian rights before a court when to follow such course was clearly known to him to be an obstruction to the administration of justice, I feel that the sentence of fine heretofore imposed should be modified, and accordingly it is hereby modified, fixed and set in the sum of One Hundred Dollars.
>
> Let judgment be entered accordingly.

President Roosevelt later remitted

(Continued on page 444)

4. General Order No. 31 is too long to print. One of the paragraphs referring to Judge Metzger by name is printed in the Appendix. See page 448.

The Courts and Tax Administration:

A Plea for a Return to the Statutory Language

by **Arthur A. Ballantine** • of the New York Bar (New York City)

■ Mr. Ballantine's thesis is that the courts have created confusion in our system of taxation by striving to achieve their own ideas of tax justice in deciding cases before them rather than following the language of the statutes written by Congress. This article is based on a paper, read at the Tax Institute Symposium held December 15, 1948, in New York City, which will be published in full in the forthcoming annual volume of the Institute. He presents ably one side of the controversy over the question, What Is Tax Justice?

■ In recent years the federal courts have exercised very freely their prerogative of applying a tax statute not in accordance with its wording, but in accordance with the judges' view of the correct tax in the particular case before them. Desirable as the result in that case so obtained may seem to be, the general result of judicial increase or contraction of statutory wording has been to create confusion and uncertainty for those who properly seek to know in advance the tax result of contemplated transactions. That confusion will be eliminated only when courts return to permitting tax statutes to stand as written by Congress.

To reject the effect of a transaction which is a sham is of course the duty of the courts in dealing with tax questions as with other questions. However, to reject the tax effect of a transaction which conforms to the wording of a tax statute is not to deny recognition to a sham, but to deny recognition to the statute itself. The statutory line may not always be clear, but observance of the line when ascertained is essential to orderly and predictable taxation.

The two great questions which arise in so many aspects under the income tax law are (1) what is income, gross or net, and (2) to whom is particular income taxable. Striking instances of confusing court departure from tax statutes are to be taken from both fields.

Courts' Departure from Statute Has Caused Confusion

The much discussed *Gregory* decisions of 1934 and 1935 (293 U. S. 465) were based upon reading in by the courts of qualifications not expressed in the statute, with uncertainty ever since as to what tax consequences may attach to corporate reorganization transactions of constant importance.

Receiving payment in the form of goods or securities, of course, does not put that payment beyond the reach of the income tax. But from the time when income tax rates became high it was recognized that for reasons both of fairness and policy the taxpayer's receipt of securities incident to a change in corporate structure ought not to be held to be a closed transaction giving rise to tax.

Recognizing the need for flexibility in business framework, beginning with the 1918 Act there have been included in the statute the so-called "reorganization" provisions. As Solicitor of Internal Revenue I happened to draw the first of those sections—Section 202 (b) of the Revenue Act of 1918. That section, said the Senate Finance Committee, was designed "to negative the assertion of tax in the case of certain purely paper transactions". This phraseology was not apt, for if what was intended was to cover only what were actually "purely paper transactions", there would have been no occasion for the exemption provision.

As experience accumulated, it was perceived that situations arising as to corporate changes were many and complex. How they should be dealt with was emphatically a matter of tax policy for Congress. They could not be brought under a single provision or phrase. In the development of the act more detailed reorganization provisions were included. The 1924 Act added a new Section 203 (c)—Section 112 (g) in the 1928 Act — which provided that

> If there is distributed in pursuance of a plan of reorganization to a shareholder in a corporation a party to the

> reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee . . . shall be recognized.

This provision was inserted as covering "a common type of reorganization" falling within the general purpose of the reorganization provisions. The language used was very broad.

Facts in *Gregory* Case Are Stated

The *Gregory* case arose in 1932 under that section, which appeared as 112 (g) of the Revenue Act of 1928, a section eliminated by the Act of 1934. The taxpayer, the sole owner of stock of the United Corporation, brought about a "reorganization" proceeding, by which a block of certain shares of stock of another corporation (the Monitor Corporation), was transferred to a specially created corporation (the Averill Corporation), the stock of that corporation being issued to her. The specially created corporation in the "reorganization" was dissolved three days later, and the block of Monitor shares transferred to it were distributed to her in liquidation. The taxpayer immediately sold the block of shares, and returned her profit as a capital gain.

The position of the Treasury was that the taxpayer had in effect received the block of shares as a *dividend* from the corporation which she owned, and that the tax due was a tax on a dividend amounting to $10,678 more than the tax on the *capital gain* from the receipt of the Monitor shares through the reorganization route, as the transaction was returned by the taxpayer.

Board of Tax Appeals Sustains Taxpayer

There was no question but that the reorganization sections of the statute (Sections 203(g) and (h)) had literally been followed in the transaction, the literal consequence being capital gain and not dividend gain. Such was the conclusion reached by the Board of Tax Appeals, 27 B.T.A. 223 (1932), which sustained the taxpayer, stating:

> A statute so meticulously drafted must be interpreted as a literal expression of the taxing policy.

On appeal, however, the court of appeals was incensed by the idea that the use of the "reorganization" method instead of the dividend method of getting out the shares to be sold could operate to accomplish the tax saving. So feeling, the court was faced with the alternative of either accepting the clear result of the application of the reorganization section as written, presumably with a sounding of a warning note to Congress, or rejecting the terms of the statute and reaching the desired tax result. The wish for what seemed a satisfactory result in the case before the court prevailed over any sense of need to adhere to the terms of the statute.

The opinion of the Court of Appeals for the Second Circuit, written by Judge Learned Hand, holding that there had been no reorganization "within the meaning of the statute", stated (69 F. (2d) 809, at 811):

> The underlying *presupposition* is plain that the readjustment shall be undertaken for reasons germane to the conduct of the venture in hand, not as an ephemeral incident, egregious to its prosecution. To dodge the shareholders' taxes is not one of the transactions contemplated as corporate "reorganizations". [Italics added.]

Sympathetic as one may be with the court's feeling against the result of application of the words of the statute to the *Gregory* facts, one may question the reasons assigned to justifying departure from the statute. As the whole purpose of the reorganization provision is to eliminate what would otherwise be stockholders' taxes, it follows that if a transaction falls within the provisions the stockholders' taxes cannot be said to be "dodged". And from what other than the *presupposition* of the court was the "underlying presupposition plain" that the readjustment must be "germane to the conduct of the venture" to the satisfaction of the court? What is covered would seem to be a question of Congressional policy as expressed by the words of the statute.

The Supreme Court without apparent hesitation supported the court of appeals. The Court stated (page 469):

> The question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended.

Exercising its own judgment as to what was intended, the Court said:

> When subdivision (B) speaks of a transfer of assets by one corporation to another, it means a transfer made "in pursuance of a plan of reorganization" . . . of corporate business; and not a transfer of assets by one corporation to another in pursuance of a plan having no relation to the business of either . . . . Simply an operation having no business or corporate purpose. . . .
>
> The transaction upon its face lies outside the plain intent of the statute.

The opinion referred to the whole undertaking as "an elaborate and devious form of conveyance masquerading as a corporate reorganization".

In spite of the language of the opinion, the fact is that the transactions had actually occurred as maintained by the taxpayer and found by the Tax Court, and that under the literal terms of the statute they constituted reorganization transactions. There was then no "sham". The difficulty which aroused the Court was that the language of the statute as adopted did not confine the exemption to cases which the Court would approve. Limitations later inserted in the act might have so confined the exemption, but such limitations were not placed there originally.

Justification for the Court's view may be argued from the elimination of Section 112(g) by Congress in enacting the Revenue Act of 1934 for the reason assigned by the Ways and Means Committee in repealing that legislation (*H.R. Rep. No. 704, 73d Cong., 2d Sess.* (1934) 14) that

> By this method corporations have found it possible to pay what would otherwise be taxable dividends, without any taxes upon their shareholders.

The elimination of the section altogether, however, instead of placing a specific limitation upon it, left the statute without provision for exemption of corporate simplifications by the so-called "spin off" recognized to be frequently desirable.

Last spring the Joint Committee on Internal Revenue Taxation proposed that the "spin off" substance of old Section 112(g) be restored to the Code, with the limitation that the exemption should not apply if

> it appears that any corporation, a party to such reorganization, was not intended to carry on business after such reorganization and the corporation whose stock is distributed was a mere device for the distribution of earnings and profits to the shareholders of any corporation a party to the reorganization.

That proposal was approved by the Ways and Means Committee and the section so limited was included in the act so passed by the House of Representatives. That Congressional action was a sound development.

The flat limitation suggested by the Court in the *Gregory* decisions led to grave uncertainties under provisions of the reorganization section other than those involved in the *Gregory* case.

In *Bazley* v. *Commissioner,* 331 U.S. 737 (1947), the Court denied as a *recapitalization* within the meaning of the exempting section (Section 112 (g) (1) (E)) a reconstitution of the capitalization of a corporation from common stock into common stock and debentures. A husband and wife owned all but one share of the 1000 shares of common stock originally outstanding. The company had an earned surplus of $850,000. Under the recapitalization plan the shareholders received in place of the original stock their proportion of 5000 shares of new common and $400,000 of twenty-year debentures, callable in whole or in part.

The commissioner ruled that the transaction did not constitute a "recapitalization" and that the debentures were received as a dividend. The Tax Court, 4 T.C. 897, 904 (1945), with five dissents sustained the commissioner on the ground that the recapitalization, while desired by the stockholders, lacked "a legitimate corporate business purpose within the Gregory principle". The court rejected testimony that the shareholders wanted the new capital stock available in smaller units for distribution among key employees.

The court of appeals sustained the Tax Court, and the Supreme Court sustained the court of appeals. The Supreme Court avoided discussing the "business purpose" doctrine and relied upon a "net effect" test, maintaining that the debentures distributed were essentially equivalent to cash and could have been retired at the will of the recipients. Similar results were reached in the *Adams* case (5 T.C. 351 (1945), 331 U.S. 737 (1947)), another recapitalization transaction case.

Now there could be no denial that the transactions in the *Bazley* and *Adams* cases were "recapitalizations" in the sense of ordinary speech, and that the statute contained no limitation on "recapitalization" to be recognized. True, the debentures issued in recapitalization might have been paid off later by the company, and if so, the proceeds received in "recapitalization" might have been treated as capital gains instead of as dividend income, but there was no evidence in either case that the "recapitalization" debentures could have been readily marketed or that the corporations did pay them or plan to pay them off.

As to the capital gain aspect, if the original corporations had been liquidated, the entire proceeds to shareholders over their investment would have been capital gain. Whether possible recovery of *part* of the investment through retirement of debentures was or was not to be treated as capital gain seems clearly a matter of legislative policy, not a matter to be settled by limitation read in by the courts.

"Business Purpose" Test Is Insufficient

Introduction by the courts of the idea that adequate "business purpose" is essential to an effective reorganization transaction left open the question of what constitutes a "business purpose", whose purpose governs, and how such a purpose is to be proved. For a time the Tax Court followed the view that the purpose required could not be satisfied by a business purpose of the *stockholders*

Blackstone Studios, Inc.

Arthur A. Ballantine is a practicing lawyer in New York City. He was Under Secretary of the Treasury in 1932-1933, and has had considerable experience in the taxation field, having served as Solicitor of Internal Revenue and Advisor to the Joint Committee of Congress on Internal Revenue among other posts.

themselves, no matter how clear, but must be a business purpose of the *corporation* as a distinct entity. That view was challenged from the beginning by Judge Kern of the court, who discerningly said:

> A realistic view of the ultimate purpose of a private corporation is that it is to make money for the investors . . . and to distribute to them as much as possible and practical out of its gross income.

Judges Maris and Goodrich of the Court of Appeals for the Third Circuit (155 F. (2d) 237, 245 (1946)) succinctly stated that objection in dissent in the *Bazley* case, stating:

> A corporation does not have purposes apart from its shareholders. . . .
>
> If reorganization provisions contain too many avenues of escape for taxes . . . Congress can close those avenues by appropriate legislation which can be so framed and defined as to leave the way clear . . . .

The Tax Court ultimately abandoned its view that the business purpose carrying exemption must be a business purpose of the corporation rather mystically distinguished from its shareholders. In deciding the *John B. Lewis* case, 10 T.C. 1080 (1948), the court finally stated:

> To say that a corporation, as such,

can have motives and purposes apart from its stockholders, the collective group of individuals who own it, is to indulge in metaphysical reasoning which has no proper place in such practical matters as taxation.

In spite of the change in the attitude of the Tax Court, uncertainty resulting from the *Gregory* decisions still remains. Whether the "business purpose" test or the "effect" test is read into the statute doubts assail the business man and his lawyer contemplating important transactions under the statute.

Magill Tax Study Report Recommends Change

It was to eliminate reorganization doubts that the Special Tax Study Committee, of which Roswell Magill was Chairman, recommended to the Committee on Ways and Means:

> that section 112 be supplemented with a provision that no other conditions, requirements, or qualifications not specifically expressed in the foregoing section shall be applied, unless the Commissioner shall have established, by a clear preponderance of the evidence, that the principal purpose of the plan of reorganization is to defeat or to avoid the income taxes imposed by Chapter 1 of the Code.

Such a provision would be novel, but insufficient. The qualification would still leave the doubt as to what constitutes a "principal purpose". The only cure is the "meticulously drafted" statute and adherence to it by the courts.

The *Higgins* v. *Smith* decision of the Supreme Court in 1940 (308 U.S. 473), dealing with certain losses, presents a notable case of reading into the statute a provision not there. In 1932 the taxpayer sold to a corporation, the stock of which was owned by him, securities which had depreciated in market value much below their cost to him. There was no question of the fairness of the sale price to the corporation, but the Treasury disallowed the loss on the ground that there had been no real disposition of the shares by him.

Decision in *Higgins* Case Another Departure

In the case of shares sold by a taxpayer to similarly owned corporations at a *profit* the Treasury had always asserted tax, as it does today. Four courts of appeal had rejected the Treasury contention that losses in the case of such sales should be disallowed. The Treasury had urged Congress to amend the statute, and the result was the adoption in the Revenue Act of 1934 of Section 24 (a)(6) authorizing such disallowance. That act expressly provided however that

> The provisions of this title shall apply only to taxable years beginning after December 31, 1933. Income . . . taxes for taxable years beginning prior to January 1, 1934, shall not be affected by the provisions of this title but shall remain subject to the applicable provisions of prior revenue Acts.

The Supreme Court sustained the disallowance of the loss in this case on the ground that since 1930 the Treasury had been urging such a position. The disregard by the Court of the statute itself and of established judicial interpretations aroused Justice Roberts to vigorous protest. In his dissent he said:

> I am of opinion that where taxpayers have relied upon a long unvarying series of decisions construing and applying a statute, the only appropriate method to change the rights of the taxpayers is to go to Congress for legislation. . . . The action taken in this case seems to me to make it impossible for a citizen safely to conduct his affairs in reliance upon any settled body of court decisions.

He might have added "or statutory wording".

Clifford Doctrine Ignores Legal Title for Tax Purposes

The much discussed decision of *Helvering* v. *Clifford*, 309 U.S. 331 (1940), is based upon a departure from the statute as to who pays the tax on income. The statute makes specific provision as to cases in which some one other than the legal owner of income is held for the tax upon that income. In the *Clifford* decision the tax was held to reach one not the legal owner, in a case not provided for in the statute, with resulting confusion ever since.

The income in question was that of a trust created under the laws of Minnesota, under which the wife of the grantor was the income beneficiary. The decision was that notwithstanding the wife's legal ownership of the income, the income should be taxed to the grantor.

The *Clifford* trust was to continue for five years unless earlier terminated by death of the grantor or his wife. The income was to be paid to the wife not later than the termination of the trust, but on the termination the principal of the trust was to be paid over to the grantor. The grantor was trustee and retained broad powers as to management and investment.

The commissioner taxed the income to the grantor, asserting tax liability in the amount of $2,756. The Supreme Court, in sustaining the Treasury, relied upon Section 22 (a) of the statute (Revenue Act of 1934) but that section merely defines gross income and contains nothing as to treating income as other than the income of the legal owner. The Court stated that the issue was "whether the grantor after the trust has been established may still be treated, under this statutory scheme, as the owner of the corpus", saying:

> In absence of more precise standards or guides supplied by statute or appropriate regulations, the answer to that question must depend on an analysis of the terms of the trust and all the circumstances attendant on its creation and operation.

The Court rested its decision to disregard *legal* ownership as the basis of tax upon the combination of three factors: the short term of the trust, the beneficiary being a member of the grantor's family and the retention of broad powers of management by the grantor.

Treasury Has Sought To Expand *Clifford* Doctrine

The Treasury has since pressed the taxability of trusts on the ground of any one of the above factors, and has asserted liability of grantors of trusts where there is a reversion within the period of ten years or, if management powers are reserved, a reversion within fifteen years.

The result has been ceaseless confusion on the subject. A first attempt

(Continued on page 450)

The British Courts and Parliament:

The Judiciary in the British Constitution

by the Right Honorable Sir David Maxwell Fyfe • Former Attorney General of the United Kingdom

■ The British Constitution is unwritten, and the executive and judicial branches of government are subordinate to the legislative. Nonetheless, the separation of legislative and judicial power has been carefully preserved. This article, which is taken from the script of a broadcast made by the author over BBC, explains how the independence of the British courts is maintained in the English constitutional system.

■ In Great Britain, the separation between the legislative power of making new laws and the judicial power of deciding whether there has been a breach of existing law, has been carefully preserved. In general, tenure of high judicial office precludes membership of the legislature. To this the Lord Chancellor is the only real exception. But a functional separation is not enough. The judge must be personally immune from interference by the legislature or the executive. This was provided by the Act of Settlement, 1701. Since then, judges in Britain may act without fear. The independence of mind of the judges is also helped by the fact that they are chosen from among eminent members of the Bar. There is no official road to the judicial bench as on the continent of Europe.

The legislature—in theory the King in Parliament, but in practice the two Houses of Parliament, the Lords and Commons—has very wide powers. In countries with a written constitution, such as Australia or the United States, the judges of the Supreme Court may be considered to have the ultimate sanction: They can declare legislation to be contrary to the Constitution and so void. In Great Britain, on the other hand, the legislature is undoubtedly supreme. Within the limits of physical possibility and electoral sympathy, Parliament may make or change any law it pleases. When once a judge has ascertained the law which governs an issue, he has no choice but to apply it.

It must never be forgotten however that Parliament now operates at the command of the executive. Originally the King's servants, the Cabinet and other ministers in a Government are now the leading members of the political party with a majority in the House of Commons. No legislation involving the spending of public money can be initiated without their consent. In fact therefore Parliament makes laws in accordance with the will of the people as interpreted by the Government of the day. The latter holds the executive power until by a defeat at an election or a revolt of its followers it loses its majority in the House of Commons and resigns. Such are the holders of the legislative, the executive powers and the judicial powers. Parliament at the behest of the executive makes the statutes and judges interpret them.

Nevertheless, in the course of dispensing justice through the centuries the courts have evolved a system of law independent of that enacted by Parliament. This is called the common law—which may be described as the customs of the realm as enunciated and developed by judicial decision. Thus, there are two main sources of English law: Acts of Parliament and the common law.

It is now sixty-three years since Professor Dicey urged that the "Rule of Law" (that is the fact that everyone—private citizen, government official or minister—is answerable to ascertainable law) was the primary defense of the liberties of Englishmen.

Already, when Dicey wrote, certain powers of making laws and of improving them had been delegated to the executive by Parliament. This practice had not then become extensive and Dicey chose to ignore it. Such delegation involves, of course, some relaxation of the strict doctrine of the separation of powers. For this

reason it must be carefully watched, and the rights of citizens must be adequately safeguarded. Since Dicey's time, delegation has become an essential element of the British Constitution. The best way to describe the present relationship, in this respect, between the executive, Parliament and the judiciary, is to state the principles of the rule of law as enunciated by Dicey and to investigate the extent to which his principles must be modified to accord with contemporary fact. Dicey sees in the rule of law two important propositions: (1) The predominance of regular law as opposed to arbitrary power; (2) The fact that all men are equal before the law. I shall consider each in turn.

State Now Regulates All Spheres

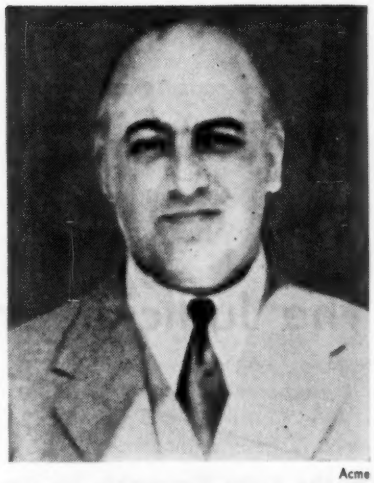
By "regular law" Dicey meant, as we have seen, acts of Parliament or the common law. When Dicey wrote, the State concerned itself in the main with defense and maintenance of internal order. During the last fifty years, however, the State has come to regulate all the major spheres of life.

It has assumed the duty to protect its citizens from economic want, to regulate the planning of towns, to control conditions of labor, and so forth. To make such complicated measures of social legislation effective, innumerable rules and regulations are required. Parliament has not the time to pass them all. For the sake of convenience, Parliament delegates to appropriate government departments the power to issue regulations, within strict limits, which have the force of law. All these regulations are issued under the authority of Parliament but not always subject to Parliamentary scrutiny. However, should a government department issue regulations in excess of the powers delegated by Parliament, then the courts will declare such regulations void and of no effect. This prevents any organ of the executive becoming autonomous. Thus, subject to delegation of legislative powers, "regular law" is still the only law. The greatest danger which has to be guarded against is that excessive delegation of legislative powers may result in general uncertainty as to what the law on any particular subject is, owing to there being too many sources of legislation to reckon with.

"Arbitrary power" means a power of the executive either to interfere with the liberty of the subject in a manner unrestrained by law, or in accordance with a law so wide—such as the law against "anti-social activity" in totalitarian states—that it imposes no effectual restraint upon the authorities, or to interfere with liberty without a fair trial. This principle that the executive wields no arbitrary power still holds good. The writ of *habeas corpus*, by which the court orders a man held in custody to be brought up for trial, prevents arbitrary imprisonment. The police have no powers of arrest beyond those laid down in the law of the land; if they act wrongfully, they are liable for damages.

Prolonging War-Time Laws Is Dangerous

There is, however, in the prolonging into peace of war-time legislation, a danger of legalized exceptions being so extended that nobody knows how far the rights of arbitrary interference by the executive go. In this connection attention must be drawn to an increase of powers of ministers. Social legislation often confers upon the minister, or upon an executive body, power to exercise a quasi-judicial discretion. For example, the minister himself or a local authority, may have power to acquire land or houses, subject, of course, to proper compensation for the owner, in connection with town planning or slum clearance schemes, or social services generally. The selection of suitable land or houses involves the exercise of a discretion. The minister may order an inquiry, conducted by someone he appoints, to help him to arrive at his decision. But the discretion is controlled in two ways. First, if the minister acts outside the powers conferred by Parliament, his order will be quashed by the courts. Secondly, the minister must act according to the rules of natural justice. That is, he must give the persons affected notice and an opportunity of stating their views. Even with these safeguards the exercise of such ministerial powers must be closely watched.



Acme

Sir David Maxwell Fyfe is a former Attorney General of the United Kingdom, who will be remembered for his part in the prosecution of the leading Nazis at the Nuremberg trials. He has been a Conservative member of Parliament since 1935.

The most important result which flows from Dicey's second proposition, that all men are equal before the law, is that officials enjoy no immunity from legal process. They are individually responsible for their acts, and must abide by the law of the land like any other citizens, and the procedural difficulties in the way of a citizen who wishes to sue the State have been removed.

To sum up: The separation of powers, together with the independence of the judiciary, prevents arbitrary power in the executive. This promotes the rule of law. As the State regulates more and more of the activities of the community, Parliament must delegate powers of making and enforcing laws to the executive. This delegation of powers is inevitable and potentially dangerous. The citizen's protection lies in the watchfulness of Parliament and in the independence of the courts of law.

The Lawyer and the Poet: Grist for the Mill of Legal Art

by Ben W. Palmer • of the Minnesota Bar (Minneapolis)

▪ Oratory in the courtroom has gone out of style, and lawyers usually regard poetry with an aversion akin to contempt. Mr. Palmer reminds us that law is an art, not a science, and that imagination is as important a legal tool as a knowledge of hearsay or the Rule against Perpetuities. He warns of an "atrophied imagination" if we neglect the works of Shakespeare, Milton, Browning and the rest, whose names too often conjure up for us only vague recollections instead of an image of the wide expanse that deep-browed Homer rules as his demesne.

▪ You and I, aspiring like Bacon, cannot take all knowledge for our province. But the intellectual appeal of our profession, and one of its glories, is that everything is grist to our mill. We can never tell when a bit of information will be of value, perhaps fit into the mosaic of a lawsuit. Today it may be a knowledge of the chemistry of flour or the anatomy of the eye, tomorrow how a piece of machinery works or how long it ought to take a bricklayer to lay a certain course of bricks. Always there is the problem of human nature: the unique witness, judge, juror, clients actual or prospective. We know from experience that our practice is not simply science: it is an art. And since it is an art we can gain knowledge and inspiration, insight into the emotional and mental processes of ourselves and others by some consideration of the other arts.

So it is that we refrain from saying of the lawyer and the poet what Hamlet said of the player: What's Hecuba to him, or he to Hecuba?

It is true that occasionally a lawyer who has worn threadbare in jury-perorations a piece of verse—particularly in the old days when orotund oratory was more in style than now—may recognize a passing obligation to the poet. But generally our attitude towards poets tends to be that of the average American he-male. Poets are an effeminate, panty-waisted lot of impractical dreamers, affecting slouchy dress, long hair if not the lily of Oscar Wilde, flowing ties, of mincing gait, swinging hips and lithping speech: expert at balancing teacups among silly fawning women at fashionable afternoon teas. Your American business man or lawyer would write to his son as Chesterfield did to his: "I do not find that God has made you a poet; and I am very glad that he has not."

And yet on reflection we know that the real poet as distinguished from the spurious, certainly the poetic genius, has and always will have a place of honor on the earth because of his services to humanity. We know that our scarcely-concealed contempt for living poets as distinguished from the dead is due in part to failure to distinguish poetry from verse.

Writing Poetry Is More Than Rhyming Words

Certainly the jingle-jangle of rhyme or melodious lines is not enough, or facility in making feet that do not stumble. From the Greeks to Sandburg or Francis Thompson the distinction has been clear. Horace said, "One must do more than make verses scan". Sir Philip Sidney wrote, "It is not riming and versing that maketh a poet, no more than a long gown maketh an advocate". Lamb spoke of George Dyer "who writes odes where the rhymes like fashionable man and wife keep a comfortable distance of six or eight lines apart, and calls that 'observing the laws of verse' ".

Sam Johnson said, "I used once to be sadly plagued with a man who wrote verses but literally had no other notion of a verse, but that it contained ten syllables. 'Lay your knife and your fork across your plate' was to him a verse. As he wrote a great number of verses, he sometimes by chance made good ones, though he did not know it". Boswell continues: "He spoke slightingly of Dyer's Fleece. The subject, Sir, cannot be made poetical. How can a man write poetry of serges and druggets?" Boswell then referred to a poem which when read in manuscript at Sir Joshua Reynolds' had made all the assembled wits laugh, when, after much blank-verse pomp, the poet began a new paragraph thus:

> Now, Muse, let's sing of rats.

And what increased the ridicule was, that one of the company who slyly overlooked the reader, perceived that the word had been originally

mice, and had been altered to rats as more dignified.

Sir Walter Scott Sums Up General View of Poets

Disregarding such subtle gradations of dignity, the inane artificer, however technically skillful – perhaps like polite Romans of Caesar's day writing "poems" in the shape of eggs or hatchets or with every word of a certain number of letters or syllables –the inane artificer has always had our contempt. So it was that Sir Walter Scott's candid Marjorie Fleming wrote:

> He was killed by a cannon splinter
> Quite in the middle of the winter.
> (Perhaps it was not at that time,
> But I can get no other rhyme.)

Louis Untermeyer speaks of that sense of discovery which distinguishes poetry from versification. For true poetry of course consists of more than form. Like true architecture it is more than mere embellishment, encrustations of design. It represents a perfect marriage of form and substance, fusion of soul and body, materials yielding to the inescapable logic of function, of aspirations and of thought and feeling. Without the informing thought and feeling and aspiration toward ideal beauty the vehicle is empty, the words or substance futile. True poetry beautifully, rhythmically, concisely and concretely reveals universal truth, relationships of human significance unsuspected or unexpressible by other men but passionately apprehended by the insight of the poet.

Genuine poetic production requires a double process. First there is what appears to be an intuitive flash of recognition of universal, divine or absolute truth or ultimate reality behind the sharply visualized object or the vivid image it invokes. This is that inspiration, that "blowing into", that fine frenzy to which Democritus referred, and Plato: "God takes away the minds of poets, and uses them as his ministers in order that we who hear them may know that they speak not of themselves who utter these words in a state of unconsciousness, but that God is the speaker". This it is that makes the lunatic, the lover and the poet all akin. This it is that makes us suspect the sanity and therefore doubt the practicality of the poet. It raises the old question of the relationship between genius and insanity to which I think Lamb gave the answer when he said, "It is impossible for the mind to conceive of a mad Shakespeare".

If the fall of the apple on Newton's head was momentous in its scientific consequences, it was because he saw a relationship between that apparently inconsequential object and the planets in their courses. In a definite sense his mental process was akin to that of the poet who sees, in what to other men is insignificant or meaningless concrete a manifestation of a universal law or some deep principle of profound or stimulating human significance. It is this universal in the individual that is the appeal of Shakespeare's characters, of the face of a madonna as visualized by sculptor, painter or poet, of suffering humanity in one of Dostoevsky's characters, the peasant of Millet or "The Man with a Hoe".

Imagination Is Important to World of Progress

Because the spectacular triumphs of science in the last century or two have been primarily on the surface the result of the laborious acquisition and analysis of facts by the inductive process, we are prone to overlook the place of imagination in the world of progress. We forget that hypothesis is a necessary instrument of such progress and that hypothesis is the result of an imaginative process. Before the scientist can achieve that synthesis which is indispensable to the formulation of a scientific law or principle he must crystallize or fuse the discrete mass of facts by an act of the creative mind. And even as a means to cutting his way through the jungle of acquired facts to new ones he must mark out his course. He must cut his path in accord with an imaginatively conceived destination.

All of us remember the first fine careless rapture when a certain line of Shakespeare or of some beloved poet leaped from the page and burst into sudden unexpected beauty. A new planet swam into our ken. Our thoughts or feelings ripened by new experience in the springtide of youth or by observation in the flush of manhood, lying submerged perhaps in our subconscious or too deep or profound for words of ours suddenly found vivid and apt expression in the poet's line.

So it is that the words of Fra Lippo Lippi apply to poet as to painter.

> For, don't you mark? We're made so
> that we love
> First when we see them painted, things
> we have passed
> Perhaps a hundred times nor cared to
> see;
> And so they are better, painted–
> better to us,
> Which is the same thing. Art was given
> for that;
> God uses us to help each other so,
> Lending our minds out.

And this of course refers not simply to the emphasizing pencil of the poet or painter, calling our attention to beautiful specific detail. It refers to that vision of the universal divine in or behind the single object of our sight. It is to this vision that Carlyle referred in his essay on Goethe when he wrote that Shakespeare does not look *at* a thing, but *into* it.

Difference Between Poet and Scientist Is One of Method

The net result of the poetic insight, the thing that gives it its value, is therefore the same as the end result and object of scientific inductive research or of philosophical processes of logic and of syllogism. The only difference is in the method. Scientist or philosopher proceed generally by step-by-step laborious ascent, cutting visible footholds in the heights as they ascend; the poet leaps.

It is this difference between philosopher and poet that has caused the quarrel between them ever since at least the days of Plato. He told of the poets calling the philosophers vain-howling dogs. And though he seemed to favor the philosopher, he couldn't make up that great mind of his. In one place he speaks of poets as creative souls conceiving wisdom and virtue just as Emerson says poet

and philosopher are one. In another passage Plato refers to poets as the fathers and authors of wisdom. It is doubtful that he would agree with Schiller's words to Goethe: "The poet is the only true man, and the best philosopher is but a caricature in comparison with him." For like Aristotle who wrote "no great genius ever existed without some touch of madness", Plato wrote "the sane mind knocks in vain at the door of poetry". And his practical conclusion in the *Republic* was "We shall be right in refusing to admit the poet into a well-ordered State, because he awakens and nourishes and strengthens the feelings and impairs the reason. He is a manufacturer of images and is far removed from the truth." The delightful irony of course is that poetic Plato with his own immemorial images would be excluded from his Republic by his own criterion.

But the poet's leap of inspiration fails unless he has the energy, industry and ability, the conscious or unconscious knowledge of the canons of his art, to set forth his vision with effective power. The first process, inspiration, must be followed by the second, *Hoc opus, hic labor est.* Here the poet must cut and carve and polish, throw overboard perchance some darlings of his heart, do his best to pass his vision on to others through the medium of words. His words must be interesting; they must be exact; they must be moving; they must be comprehensible. No matter how vivid the vision to his inward eye he must try to retain that vividness in both its specific detail and its universal truth. And above all he must be concise; for verbiage is fatal.

Concision Is Essential to True Poetry

Many a poet of the passing day lies forgotten and unwept, remembered not even for a single line, because he overlooked the need of concision. Lowell, for example, has preserved for posterity like a fly in amber one James Gates Percival of whom he writes: "His verse carries every inch of canvas that diction and sentiment can crowd, but the craft is cranky, and we miss the deep-grasping keel of reason which alone can steady and give direction. His mind drifts, too water-logged to answer the helm. . . . If he had a port in view when he set out, he seems to give up all hope of reaching it; and wherever we open the log-book we find him running for nowhere in particular, as the wind happens to lead, or lying-to in the merest gale of verbiage."

Not in multitude of words but in winged precision lies the secret of the poet's power. And his truth will not find its lodgment in reader's heart and mind unless the form he chooses and the music of his verse conform to the rhythm of his thought and feeling. There must be an inner logic of the structural form and the choice and order of his words that unconsciously strike the reader as eminently fitting. Maybe he intended an ode but it turned to a sonnet because Rose crossed the road in her latest new bonnet. But maybe the container of form was too big or too little for its content. Or the subject did not lend itself to rhyme. Or he did not have an ear for music. Or perhaps he was too abstract so that as someone said of Hobbes he wrote verse merely to prove what execrable poetry philosophers could write.

But it is not simply the truth the poet gives us, or his magic beauty lighting up the landscape of prosaic lives; it is the stimulus to our own imagination that marks his value. Pitiful, yet typical of how many men 'round whom the shades of prison house of humdrum life have closed, are Darwin's well-known words. Speaking of his mature life he wrote: "I wholly lost, to my great regret, all pleasure from any kind of poetry, including Shakespeare . . . Up to the age of thirty, or beyond it, poetry of many kinds . . . gave me great pleasure . . . But now for many years I cannot endure to read a line of poetry: I have tried lately to read Shakespeare, and found it so intolerably dull that it nauseated me . . . If I had to live my life again, I would have made it a rule to read some poetry and listen to some music at least once every week; for perhaps the parts of my brain now atrophied would thus have been kept active through use. The loss of these tastes is a loss of happiness, and may possibly be injurious to the intellect, and more probably to the moral character, by enfeebling the emotional part of our nature." What a tragedy in this master of science succumbing to the tyranny of facts.

Austin Dobson has put the remedy for imaginative atrophy in lighter words:

> When the brain gets dry as an empty nut,
> When the reason stands on its squarest toes;
> When the mind (like a beard) has a "formal cut";
> There is a place and enough for the pains of prose.
>
> . . . . .
>
> But whenever a scent from the white-thorn blows,
> And the jasmine-stars at the casement climb,
> And a Rosalind-face at the lattice shows,
> Then hey!—for the ripple of laughing rhyme!

Or as Emily Dickinson puts it:

> There is no frigate like a book
> To take us lands away,
> Nor any coursers like a page
> Of prancing poetry.

And it is poetry that is the great stimulus to the imagination which is not unrelated to philosophy and is the basis of hypothesis and of art. As to philosophy it has been well said of Aquinas, "he was a metaphysician in the fullest sense of the word, which means he was a poet and a pioneer with imagination enough and courage enough to step into the dark over the edge of the world". Moreover, if the scientist needs successive fruitful hypotheses for the progress of inductive science; if the historian, indeed any one seeking to comprehend apparently discrete facts by bringing order out of chaos by establishing a meaningful and convincing pattern, needs hypothesis; if all men need art in expressing persuasively the truth they find, how can the lawyer escape?

Imagination Useful to Lawyer

He need not be a criminal lawyer

"reconstructing" the crime by creative imagination. He needs imagination, uses it from day to day in prosaic unconsciousness of its utility in determining the significance of facts, in fitting them together so that they make persuasive sense, so that they tell a convincing story to jury or to judge. He needs imagination in his choice of words, not simply for their precise denotation but for those overtones of connotation that subtly stir the emotion of reader or of hearer and tend to make him wish to agree with the advocate's contention. That wish achieved, the battle is nearly won. And if it be oral argument how can the soul be deeply stirred without imagination? Dare we forget Cicero's question: "Can the delivery of you lawyers be impassioned, weighty and fluent unless the soul be deeply stirred?" And without imagination where were the triumphs of Demosthenes, Cicero, Webster, Choate, and in our day of Cardozo and of Holmes?

We need not, like Solon, put our laws in poetic form, like John of Gaunt make our grant of Potton Much Manured in rhyme,

> To Sir John Burgoyne
> And the heirs of his loin;

like John C. Calhoun begin a verse with the word *Whereas,* or emulate Macaulay's lawyer by comparing in rhyme an unrequited passion to the fortieth remainderman in an entail. We may not be protected from poetic infection by the antidotal words of Tacitus that "verse composition may be indulged in by anyone who would not make a good lawyer" or by the suggestion of Thomas Hood that we end our sonnets with a hempen line. We may not be deterred from further versification by a prize from Sulla for writing no more.

But some saturation with poetry may help us in our profession to develop unconsciously a rhythmic prose, a feeling for the apt word of color and of unobtrusive power. And we may remember that if Darwin's imagination atrophied, a lawyer neglects poetry at his peril. He embraces it to his joy and profit.

It cannot be too often stated and restated, here and elsewhere, that the principles and laws which the new governments were to make, to administer and to construe, were to be drawn from and by the processes of the common law of England, as found and held to be adapted and suited to the genius of the American people.

It cannot be too often declared that this common law was not one which had come down to the people from the prince, as a command they must obey, but one which had come up from the people as their consent and will. Customary law has, of course, always existed everywhere, and it would be wholly incorrect to minimize its influence and importance in shaping the laws and customs of other peoples than the English. But it may be safely generalized that only in England and America was the supremacy of the common law so established as that its processes, its sources, and particularly its spirit, became part of the genius of the people, accustoming them to the idea of law as means. The notions that the people were the source of laws, and that laws should be framed and enforced in conformity with their customs, their ideals, and their aims, were traditions with Englishmen long before their factual bases had become firmly established.

Greatly important in its provisions and in its guaranties, Magna Charta is more important to us in what it represents. This is, the spirit of the people, that laws were made for and by them, and that springing from their customs, they are at once the measure and the guarantee of their ever-expanding rights. A spirit which demands that all matters should go by laws, giving to each his own by settled definite rules known in advance, the determination and application of which should not be controlled by or subject to any man's caprice or whim. It is this spirit which, ever thrusting upward from the sod, as changes in seated power, changes in dynasties, and particularly changes in economic conditions enabled the bottom to come to the top, supported the people in their assertion that they are the source of the laws. This spirit supported them in their long struggle for their final freeing from every law and rule of church and state imposed upon them by any other right than their own consent and will.

—*Law As Liberator,* by Joseph C. Hutcheson, Jr. Chicago: The Foundation Press, Inc., 1937, pages 130, 132.

A Needed Reform:
A Special Administrative Court

by Patrick A. McCarran • United States Senator from Nevada

■ Senator McCarran, absorbed as he is with his duties as Chairman of the Judiciary Committee of the Senate, nevertheless maintains his keen interest in the processes of administrative law and his alertness to needed reforms in this all important field of practice. He is now sponsoring two pending bills in the Senate and emphasizes the importance of the operation of administrative agencies under the law, the simplification of administrative practice and adequate control mechanisms in the way of review in the upper courts. In the following article dealing with the subject matter of his recent speech before the Bar Association of the District of Columbia, the Senator outlines clearly his views and brings before us for consideration the important question of whether or not there should be a special administrative court.

I.

■ Before we discuss administrative law, I trust you will forgive me if I mention mankind and man. I don't mean the mythical "reasonable man" which courts use as a yardstick in negligence cases, or the "forgotten man" of politics, or the "man in the street" of the polls. I mean, instead, the normal human being. Although he is a perplexing and exasperating creature, in one way or another he almost invariably has a deep yearning for justice. It may take some queer turns, I must confess. He may surrender his freedom in deference to the demagogic argument that there is some immediate danger too big for free men to conquer. But, whatever he does, presupposes some immediate or ultimate freedom for his nation, his race, or his class.

Nero, Hitler, and Stalin all made or make pretty much that type of argument. So far as their followers had freedom of choice, they felt compelled to surrender freedom in order to gain immediate safety and then ultimate freedom again. Even here, on this continent, there is nothing very new about that form of reasoning. Nearly two hundred years ago Benjamin Franklin felt called upon to phrase the following warning against it:

> They that give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.

His words were much used in our Revolutionary period. Today people are similarly importuned to favor various schemes or leaders, usually in the name of "economic security." The works and the speakers are thus a little different, but the false lure is the same.

Apart from the queer notion that good can sometimes come despite the surrender of principle, most human beings, as I have said, have a deep yearning for the status of free men so that they may claim justice. They may not speak about it. They may even purport to spurn the notion that there is any real justice. But they seek it or expect it in one way or another. Today, for example, we find people who think we have too much conventional law in our domestic concerns but who, at the same time and without suspicion of their inconsistency, argue that the salvation of the world lies in the rapid extension of international law and international legal processes. They demonstrate my point that, in case of need, people turn instinctively to justice and its methods.

A good example of actual practice in this regard was the concern of the Founding Fathers in making provision for the administration of justice when this government was established. It was then that George Washington, writing to his Attorney General shortly to be, said:

> The administration of justice is the firmest pillar of government.

And that is just as true today as it was then.

We now have some new forms and tribunals of justice. They began to be established here just about a century after George Washington wrote that line. But even in his time, as now, men knew about "planning" and "controlled economy" and the regulation of commerce. They knew more about "administrative law" than my generation did in Nevada or than your fathers did here or elsewhere. They knew about "government by decree", except that they called them "orders in council." They had Lords of Trade, Commissioners of the Customs, and a host of other officials exercising powers over persons and property. And they didn't like the way it was being done. They said so in the Declaration of Independence where, as you will recall, the tenth complaint against

George III was that:

> He has erected a multitude of new Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.

It was for his abolition of the "free System" of laws and his establishment of "Arbitrary government" that the American colonies declared their independence.

It was in that setting that Tom Paine, the rousing pamphleteer of the Revolution, wrote:

> Tyranny, like hell, is not easily conquered, yet . . . the harder the conflict, the more glorious the triumph. . . . It would be strange indeed if so celestial an article as freedom should not be highly rated.

And do not let the supposed antiquity of that preachment delude you into easy thinking that "things are different" now. For it was no less than Woodrow Wilson who, in 1912, put the same thing even more thoughtfully when he said:

> Liberty has never come from the government. Liberty has always come from the subjects of it. The history of liberty is a history of resistance. The history of liberty is a history of limitations of governmental power, not the increase of it.

I think we may safey assume, therefore, that there is nothing really new under the governmental sun.

II.

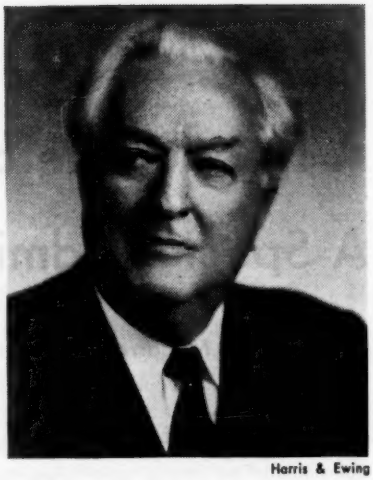
We have had a long sleep since the time of Franklin, Washington, and Paine. We have had a century or more of comparative freedom from the "swarms of Officers" about which Thomas Jefferson wrote for the signature of the men at Philadelphia in 1776. But I do not think it can be successfully disputed that the present generation has seen a rebirth of controlled economy, of state supervision over the individual, and hence of bureaucracy. Whether these things are good or bad may be beside the point. The slow tide of history has swept them upon us, and forces beyond our immediate summoning must remove them if they are ever to be removed.

Yet we, certainly, can and will fit the new state of things into our American pattern of justice. In my judgment we have at least three necessary goals in that respect: (1) *First,* we must assure that administrative justice operates under and in accordance with law. (2) *Secondly,* we must make the administrative process sufficiently simple and uniform that men of ordinary talents and intelligence, such as you and I, can operate under it. (3) *And Thirdly,* we must provide some mechanism of control designed to assure that these objectives will be realized in the individual case. I should like to mention what I mean by each of these, and by what immediate specific measures they might be made effective.

(1) First, I say, we must provide that administrative agencies shall operate under and in accordance with law. We have taken a good step in that direction by the enactment of the Administrative Procedure Act. Thereunder, in some measure, even the personal equation is being worked out by the screening of trial examiners now nearing a conclusion. We must of course be vigilant to see that the Procedure Act is honored in practice and, so far as may become necessary, is amplified and extended in the letter. We must be alert to prevent piecemeal tampering with the process which we have thus clothed with statutory status. Perhaps we should soon also begin to look toward the more extensive codification of our federal administrative law.

(2) The second of my three immediate objectives is the simplification of administrative practice. In an important sense the Administrative Procedure Act, and what we do to carry it out and amplify it, inevitably simplifies administrative justice. But that it does in the larger aspects of the subject. The lawyers of the country also need simplicity and uniformity in the more detailed rules of practice and procedure. They need it so that they may practice law with more assurance and more efficiency, so that they may serve their clients better, and so that the people of the country may have the full benefits of the services of a skilled profession.

I have explained this subject in more detail elsewhere (95 Cong. Rec. A195) and have introduced a bill in the Senate for the purpose (S. 527). You specialists here at Washington may or may not think you would benefit materially by such uniform rules of administrative practice. But certainly the lawyer and client a hundred miles away would. And I think you would, because anything that regularizes and converts the sprawling mass of administrative differentiation into a coherent legal field increases the need for both general practitioners and specialists. They, at least, now have an almost intolerable burden when expected to know how to practice before fifty to one-hundred federal regulatory agencies of country-wide jurisdiction. We owe it to those lawyers (and to their clients) to try, at least,



Harris & Ewing

Patrick A. McCarran is the senior United States Senator from Nevada. He has had a long career of public service, including a term as District Attorney in Nye County, Nevada, a term in the Nevada Legislature. He was Chief Justice of the Nevada Supreme Court in 1917-1918, and had previously served as an Associate Justice. He was elected to the Senate in 1933. He was Vice President of the Association in 1922-1923.

to make it more nearly possible for them to advise and represent their clients on every necessary occasion at their places of residence.

There is no doubt, I think, that simplification and uniformity of the rules or practice of federal administrative agencies will come eventually. It may be easier, and less disruptive of administrative agencies themselves, if we begin to move in that direction now. It will of course aid the bar, at least the general practitioners in the smaller communities of the country, if they have the benefit of such simplified and uniform rules now rather than at some time far in the future.

(3) Thirdly, as I said a bit ago, we must provide some mechanism of control, designed to assure that both conformance with law and procedural regularity will obtain in the individual case. That is the sort of thing we ordinarily try to do by having our courts review administrative acts and commands. There again we have, in some measure at least, made an advance in the Administrative Procedure Act. By section 10 of that Act we have made a basic declaration of public policy as to the existence, and scope, of judicial review of administrative agencies.

But, I am becoming convinced, as the American Bar Association was convinced over ten years ago, that we must also provide a special tribunal to review administrative action. I have also discussed that elsewhere (95 Cong. Rec. 573-575), have introduced a bill for the purpose (S. 684), and will not labor the subject here. Such a special tribunal is required, I believe, because of the heavy burden our regular courts are now carrying, the technical nature of the administrative cases we ask them to assume as well, and the obvious advantages that a specialized tribunal would bring to the task. The Court of Claims, the customs courts, the Tax Court, and the wartime Emergency Court of Appeals—all testify to the use of specialized courts as instruments of national policy as occasion has demanded. They have functioned well. I know of no higher tribute that could be paid to them than the fact that, when the American Bar Association proposed some ten years ago that they be merged in a new Administrative Court, the bar which practiced before them would have none of it.

But, I think that my proposal for an Administrative Court should be modified in one particular. If you study carefully the jurisdiction of the specialized courts we already have, you will discover that in most cases the lawyer (and his client) are given a choice whether to proceed in the specialized court or in the regular courts of the land. The taxpayer, for example, may go to the Tax Court or, if he wishes, he may pay his tax and sue for refund in the regular trial courts. Again, except for the larger cases, one who claims money from the United States may go either to the Court of Claims or the district courts. Patent cases are another such example. Perhaps it is a healthy thing that there be such a choice. Experience and actual practice so indicate.

S. 684, the bill I have recently introduced for the creation of an Administrative Court, adopts that principle of choice *except in the District of Columbia*. The bill was drawn that way because I thought it fitting that the specialized Administrative Court should have exclusive administrative-review jurisdiction in the district of its heaquarters. With or without such a provision, I have no doubt that administrative-law cases would in most instances be lodged in that court. On the other hand, there would appear to be no reason why a litigant, even in the District of Columbia, should not have the choice in case he should desire to proceed differently. Therefore, I have introduced an amendment in the nature of a substitute to my Administrative Court Bill, under which the principle of choice is made uniform, and the provision granting exclusive jurisdiction to the new court is eliminated.

CONCLUSION

In conclusion, I should like to remind you of your responsibilities in this field. I believe that the three lines of advance I have indicated are natural and inevitable. But, of course, it is not for me alone to say what shall or shall not be done. And, in a substantial sense, it is not even for Congress to say. You represent the learned profession chiefly concerned. You should speak and act in these matters. I hope you will, whether you agree with me or not. But, we certainly can agree on one thing, and that is our mutual adherence to the ideal of justice. In that regard, since we have just passed the centenary of the beginning of reform of judicial procedure instituted by David Dudley Field in New York, I should like to close with this one line from his pen: "Above all other things is justice; success is a good thing; wealth is good, also; honor is better, but justice excels them all."

A Mandate from the Bar: Shorter and More Lucid Opinions

by Marshall F. McComb • Associate Justice, District Court of Appeal (California)

■ Laymen often accuse lawyers of long-windedness, and Judge McComb reminds us in this article that "judges are merely lawyers by another name". Any lawyer who has ever waded through some of the longer opinions of almost any appellate court in search of a ruling on an obscure point of law will readily admit that the laymen are correct, at least so far as some lawyer-judges are concerned. Judge McComb finds that legal verbiage in opinions leads to confusion and waste of time, and his article —which is not verbose—outlines the essence of a good judicial opinion and some valuable suggestions to judges for composing decisions. His remarks will be equally useful to lawyers in writing briefs.

■ Frequently during the last thirty-five years I have discussed with judges, lawyers, law professors and law students the preparation of decisions. The ultimate conclusion in each case has been that we should have shorter and more lucid opinions. In fact, for several hundred years the legal profession has been protesting against prolix and unnecessary verbiage in legal documents.

On July 9, 1924, at its Forty-Seventh Annual Meeting, the American Bar Association adopted among its Canons of Judicial Ethics, Number 19, which reads in part as follows:

> It is desirable that Courts of Appeal in reversing cases and granting new trials should . . . indicate their views on questions of law argued before them. . . .

In 1940 the Special Committee of the American Bar Association on Legal Publications and Law Reporting completed a survey of the attorneys in each of the United States, which survey showed that a vast majority of the attorneys preferred *"shorter written opinions"*. In some states as high as 82.7 per cent voted in favor of shorter written opinions, and only 15 per cent appeared to prefer opinions of the then average length.[1]

Again, in 1942, the Section of Judicial Administration of the American Bar Association, in its suggestions for improvement of appellate court opinions, recommended in its report: *"Opinions—Shorter Opinions* [one of most frequent suggestions] *with concise statements of fact and simple language"*.[2]

With the full realization that the following suggestions have been used by many judges, and that there is nothing new or original in them, but with the hope that it may concentrate attention upon the subject and produce further suggestions for improvement in the preparation of decisions, I submit the following as a method of preparing more clear-cut and intelligible written opinions. It is, of course, axiomatic that a short opinion is not of itself clearer or more definite than a long one, but a bad short opinion will be much worse if lengthened. A short opinion mathematically tends to eliminate dicta.

The author of an opinion must (1) thoroughly familiarize himself with every essential fact in the case presented for decision; (2) determine the points of law involved; (3) ascertain the law which is applicable to the facts of the case presented for decision; and (4) actually formulate in his own mind a logical plan of discussing the problems presented for determination.

In taking the foregoing steps the author should take ample time to thoroughly satisfy himself that he has exhausted all avenues leading to a satisfactory conclusion in each step. He should always bear in mind that it is much easier and takes much less time to write a long, rambling, unintelligible opinion than it does to write a concise, explicit and intelligible decision.[3]

We may paraphrase the words of Mr. Justice Works thus: "We are inclined to doubt the correctness of the decision of the Court on account of the extreme length of the opinion. Knowing the ability of the judges and their accurate knowledge of the law, an opinion of so many pages, coming from them in support of a single ruling of the Court below casts great doubt upon such ruling. However, the learned Court may not have had *time* to prepare a *short opinion* and for that reason has cast upon us [the lawyers] the unnecessary labor of reading and extracting therefrom the points made. If we have overlooked any of them the

1. 65 A.B.A. Rep. 266 (1940).

2. "Methods of Reaching and Preparing Appellate Court Decisions", a report presented to the Section of Judicial Administration of the American Bar Association at its Annual Meeting in August, 1942, page 56.

3. It is often helpful after having dictated and corrected the draft of any opinion to lay it aside for several days, then to reread the proposed opinion making such corrections as appear advisable. See also Justice John D. Martin, "The Problem of Reducing the Volume of Published Opinions", 26 *J. Am. Jud. Soc.* 138, 141 (1943).

Court will readily understand the reason".[4]

State all the essential and ultimate facts in the case. It should be borne in mind that *every* essential fact should be set forth.

Evidence which is contrary to other evidence believed by the trier of fact, voluminous statements of immaterial fact and lengthy quotations from other opinions are of no value and should be omitted.

If the solution of the legal proposition presented will result in a reversal of the case, it is only necessary to set forth and discuss the one proposition involved.[5] There is no point in mutilating the corpse by discussing collateral and immaterial propositions appearing in the case.

On the other hand, if the case is to be affirmed every proposition presented by the appealing party should be stated and carefully analyzed and answered, thus leaving no doubt in appellant's mind that the court has conscientiously considered the errors which he alleges occurred in the trial of the action. Likewise cases relied on by the appealing party which are inapplicable should be distinguished. However, frequently a case cited by an appellant is so clearly not in point because of factual differences that it is an utter waste of time and space to do more than mention that a reading of the cited case shows its inapplicability due to factual differences.

A clear pronouncement of the question presented for the court's decision is of great value in clarifying in the mind of the author the problem he is considering, and tends to limit the discussion to the very point presented for determination. The result is that the decision stands as a precedent for a specific proposition or propositions of law, and eliminates endless discussion if the case is later called to the attention of a trial judge. All too frequently decisions of an appellate court have been so vaguely worded as to result in confusing the trial judge and counsel when cited in a later case.

Answer the question. Give a direct answer to the question. State that the answer is either "yes" or "no" or is either in the "affirmative" or "negative". By so doing, counsel and trial judges will know the rule of law announced by the court even though the subsequent discussion may be involved and confusing.

Give the pertinent rule of law which is controlling, with appropriate citation of authorities.

In citing authorities it is unnecessary to cite more than one or two cases which are directly in point. If an authority is in point, under the doctrine of *stare decisis* it is controlling; nothing is added to the opinion by having a legal secretary, in support of the declared proposition, copy a long list of authorities from some treatise or law journal. Such procedure simply clutters up the opinion and adds to the possibility of error creeping into the citations, such as citing cases which are not in point.

It is unnecessary in the average case to give long and extended quotations from authorities cited in support of the proposition. Such quotations in the ordinary case are merely repetitious of the statement of the proposition in the decision of the instant case, and if the reader of your opinion is interested in reading the cited authorities he ordinarily desires to read the entire case and not a mere quotation therefrom. At the present time, in every community the reported cases are readily available to any person desiring to use them.

Dictum in Opinion Wastes Space

Omit dictum from the opinion. Unnecessary discussion of rules of law in an opinion is valueless as precedents; tend to confuse the issue being decided by the court; and result in taking up space in the reported volumes which should be devoted to the discussion and decision of the particular question necessary for disposition of the case pending before the court.[6]

Be sure to distinguish between the reason for the answer to the problem presented, and the reasoning sustaining authorities cited in support of a rule of law. The former is important; the latter is usually immaterial and redundant. For example, the question presented is: "What is the period of the Statute of Limitations?" The answer is: "One year". The reason for the answer is a code section or decision which is cited. If the reasons for the adoption of the code section or decision of the case are now given, such statements in the main are immaterial, since the law as stated in the code section is controlling no matter what reasons impelled the legislature to adopt it. Likewise, the decision in the cited case is authority for the proposition, and unless you intended to differentiate the case or show that it is not sound law, the reasons which led the court to its conclusion are immaterial. If you accept the decision as authority, that ordinarily ends the matter as far as the subsequent opinion is concerned.

Apply the rule of law for which the opinion is authority to the facts of the case. State briefly and concisely how the rule of law stated applies to the facts of the specific case. By so doing, if the facts have been carefully and fairly stated, and the rule of law is sound, the average lawyer will be convinced of the wisdom and correctness of the decision of the appellate court.

State the ultimate decision. In concluding the opinion the judgment or order of the trial court should, in so

4. In *King* v. *Gildersleeve*, 79 Calif. 504, 507, 21 Pac. 961 (1889), Mr. Justice Works said: "We are inclined to doubt the correctness of the ruling of the Court below, on account of the extreme length of the brief of the learned counsel for respondent in its support. Knowing the ability of counsel and their accurate knowledge of the law, a brief of *eighty-five* pages coming from them in support of a single ruling of the Court below casts great doubt upon such ruling. However, the learned counsel may not have had *time* to prepare a short brief, and for that reason have cast upon us the unnecessary labor of reading and extracting therefrom the points made. If we overlook any of them, counsel will readily understand the reason."

5. In some states it is provided that, "if a new trial be granted, the Court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case". *Calif. Code Civ. Proc.* § 53.

6. Edson R. Sunderland, "Arguments, Decisions and Opinions on Appeal", published in the Judicial Administration Monographs, Series A, No. 17, page 93, of the American Bar Association's Special Committee on Improving the Administration of Justice. 65 A.B.A. Rep. 266 (1940).

many words, be "affirmed", "reversed" or "modified". In many cases if the judgment is to be modified, it will be helpful if the specific modification directed is set forth in the opinion.

In writing opinions the English language should be used throughout. (See Art. IV, Sec. 24, Constitution of the State of California). Only well-known Latin words and phrases should be used. Short, well-understood words, with well-defined meanings, are preferable to long, little-used words and phrases.

In selecting a word, think: First, do I know what it means? Second, how many of my readers know its meaning? Third, is there another word which expresses the same concept; if so, would more readers know its meaning? If you decide that a substituted word would be more readily understood by a larger audience use it and forego the sop to your ego; you will not fool anyone but yourself in any event as most readers will recognize the fact that the word is awkward and its meaning new to you as well as to them.[7]

The modern judge is selected because of his knowledge of the law and ability to analyze facts and apply to them the known rules of law, and not because of his forensic ability and genius in writing high sounding and flamboyant phrases. Certainly, from the point of view of the legal profession, judges would serve better, if, as suggested by Charles A. Beardsley, former President of the American Bar Association, they would seek eminence through the route of writing shorter and more lucid opinions.

Use diagrams,[8] photographs,[9] copies of exhibits or anything[10] which will tend to clarity and simplification of the opinion. Try to write it so that even the most obtuse will have no difficulty in understanding what you say, even though they may not agree with it.

Use footnotes for (1) excerpts of testimony, and (2) incidental, collateral or additional cases which you do not feel are of sufficient importance to cite in the main opinion, but which may be of some real value to subsequent readers.

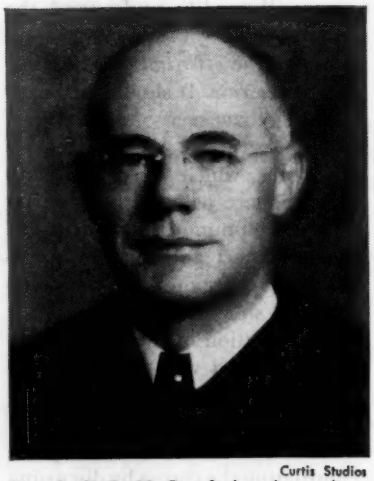
In making reference to statutes or constitutional provisions, it is frequently helpful to set forth in a footnote the text of the statute or constitutional provision referred to, for the reasons: (1) that the reader in another state may not have the statute or constitutional provision available, and (2) statutes and constitutions are frequently amended. Thus by setting them out in a footnote the reader knows whether the case is applicable to the statute or constitutional provision in force at the time he is considering the decision.

Do not scold the trial judge,[11] counsel, parties or your colleagues. It is your duty to decide the controverted questions presented, not to give your views on the numerous problems confronting humanity. Such unnecessary comments are discourteous and a waste of time. Usually they indicate an unfortunate feeling of self-righteousness on the part of the author. Remember there is never a good reason for being discourteous, even in a written opinion.

The foregoing leads to the conclusion that the last two sentences in Canon 19 of the Canons of Judicial Ethics of the American Bar Association should be constantly kept in mind by all appellate judges. It says: "A judge should not yield to pride of opinion or value more highly his individual reputation than that of the Court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in Courts of last resort."[12]

In conclusion, I quote from an article by Justice John D. Martin of the United States Court of Appeals: "The short opinion would seem to be the better vehicle for conveying jurisprudence to farther distances. Short opinions are more easily and generally read than are the longer ones. . . . Let there be no unsolved mysteries in the Courts. Reasons for the decision of cases should be always unmistakably clear. And each judge to his own style; for, as has been well said, in writing, *style is the man*."[13]

Judges are merely lawyers by another name, hence shorter and clearer briefs will lead to shorter and more lucid opinions.[14]



Curtis Studios

Marshall F. McComb has been Associate Justice of the California District Court of Appeal since 1937. Born in Colorado, he received his A. B. at Stanford, and his LL. B. at Yale. He served as an ensign in the United States Navy during World War I, and has been a lieutentant commander in the Naval Reserve since 1932. He has been a member of the Association since 1923.

7. It should be borne in mind that an ignoramus is one who does not know something that you have just learned. See Rudolph Flesch, *The Art of Plain Talk* (1940).

8. *Box v. Van Slooten*, 38 Calif. App. (2d) 554, 556, 101 P. (2d) 780 (19—); *People v. Walker*, 76 Calif. App. (2d) 10, 12, 172 P. (2d) 380, 381 (19—).

9. *Junge v. Midland Counties Public Service Corp.*, 38 Calif. App. (2d) 154, 161, 100 P. (2d) 1073, 1076 (19—); *Barker v. City of Los Angeles*, 57 Calif. App. (2d) 742, 745, 135 P. (2d) 573, 575 (19—); *Techumy v. Brooks Market*, 79 Calif. App. (2d) 556, 559, 180 P. (2d) 512, 513 (19—); *People v. Golden*, 76 Calif. App. (2d) 769, 770, 174 P. (2d) 32, 33 (19—).

10. *Lawrence v. City of Los Angeles*, 53 Calif. App. (2d) 6, 9, 127 P. (2d) 931, 932 (19—).

11. There is an exception to this general rule, of course, where the judicial misconduct of the judge is presented as one of the reasons for reversing the judgment of the trial court. See *Etzel v. Rosenbloom*, 83 Calif. App. (2d) 758, 189 P. (2d) 848 (1948).

12. 62 A.B.A. Rep. 1129 (1937).

13. Justice John D. Martin, *loc. cit. supra* note 3.

14. Robert G. Simmons, "Better Opinions—How?", 27 A.B.A.J. 109, 111 (February, 1941). See also a splendid article containing suggestions for the preparation of briefs on appeal by Justice Emmet H. Wilson, "Appellate Court Practice—Briefs and Oral Argument", 22 *J. State Bar Calif.* 69 (1947).

Lottery Laws in the United States:

A Page from American Legal History

by **William E. Treadway** • of the Kansas Bar (Topeka)

■ Lotteries are forbidden by statute in all forty-eight states, and the transmission of lottery tickets through the mails is prohibited by Congress. Many persons assume that lotteries have always been considered illegal in and of themselves. Mr. Treadway points out that this is far from true, and that in the early days of the Republic Congress and the state legislatures frequently resorted to lotteries as a means of obtaining revenue. In this article, he describes some of the lotteries conducted in this country and the cases arising from them decided by American courts. Mr. Treadway's article is not a brief for or against lotteries, but merely gives information about a forgotten chapter of American legal history.

■ Of all sumptuary legislation enacted in the United States, the various state and federal statutes tending to outlaw traffic in lotteries perhaps have withstood both frontal assault and flank violation for the longest time. For example, they have witnessed national prohibition of liquor come and go.

Technological advances in means of communication and current merchandising methods are again focusing attention on lottery laws. Radio programs, reaching into substantially every home, are under the scrutiny of a federal regulatory body seeking to determine whether or not offers of fabulous prizes may, in some instances at least, come within the prohibition of lotteries. A national gathering of newspaper publishers has requested a clarification by the Federal Government of its highly penal act in so far as it may affect advertising practices.

The lottery has been banned by statute within the United States for a period longer than most lives now in being. It is not surprising that some persons may take for granted that lotteries always have been considered wrong in and of themselves. Nothing is further from the truth.[1]

In the early history of the United States, Congress and the state legislatures felt no compunction whatever in resorting to lotteries as a means of obtaining revenue. It was not until 1892 that the last state lottery, that of Louisiana, was prohibited effectively by statute.[2]

It is neither the purpose of this article to make a case for the revival of the lawful lottery as a possibly efficient revenue raising measure, nor to debate its moral aspects. However, an exposition of the place occupied by the lottery in the early economic and legal history of America, when it was looked upon as an unmoral and useful device, may be of some present day interest in view of current discussions.

In the first several decades of our country, lotteries were among the common and favorite methods of raising money for the general funds of government and especially for schools, roads and bridges. Even the construction and maintenance of churches and cemeteries was authorized in this manner by specific enactments.

Act of Congress Authorizes the National Lottery

The City of Washington was incorporated under an Act of Congress of May 3, 1802, which in enumerating the powers of the municipality, authorized "the drawing of lotteries, for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish".[3]

The only limitations exacted were that the amount to be raised should not exceed ten thousand dollars in any year and that the object should first be approved by the President of the United States. Pursuant to this congressional authority, a city ordinance was adopted, creating "The National Lottery" and empowering it to sell tickets and to conduct drawings. Successive resolutions thereafter were passed for the drawing of

1. Lotteries "are not, in the legal acceptation of the term, *mala in se*, as we have just seen, but may properly be made *mala prohibita*", *Stone v. Mississippi*, 101 U. S. 814, 821 (1879).
2. Louisiana Acts 1892, No. 25, §§ 1-4.
3. 2 Stat. L. 725.

lotteries in the maximum amount per year for various improvement projects.[4]

During the course of a drawing in Washington, it was discovered that the wheel of blanks and prizes contained one less blank than should have been included. Thereupon another blank was thrown in. The legality of the drawing was upheld in an opinion by Chief Justice Marshall in 1825 with the observation: "The tickets previously drawn could not be affected by this act. The rights to prizes which had been previously vested could not be devested by this act. The establishment of the lottery thus drawn can be attended with no pernicious consequence. The transaction was, throughout, perfectly fair". . . . After commenting that the absence of the blank at the conclusion of the lottery would have vitiated the whole transaction, and that frequently improper motives might exist for producing that very result, he concluded: "However questionable may be the policy of tolerating lotteries, there can be no question respecting the policy of removing, as far as possible, from those who are concerned in them, all temptation to fraud."[5]

Supreme Court Upholds Validity of the Washington Lottery

Some doubt was cast upon the power of the City of Washington to conduct a lottery on its own account, by litigation which reached the Supreme Court in 1827. This suit had questioned whether the act of Congress which "authorized" the drawing of lotteries empowered the city government to do so in its own name and at its own risk, or whether its power was limited to the selling of that privilege to individuals. It was contended that Congress had not granted the power to draw lotteries, but only to "authorize" their being drawn. In an opinion by Chief Justice Marshall, the Court said: "We cannot admit the justice of that construction which denies to the corporation the power of causing the lottery to be drawn on its own account. . . . The single object for which the lottery can be drawn, is 'any important improvement in the city,' not the emolument of individuals. . . . It is to be for 'any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish'; and is subject to the judgment of the President of the United States. . . . If the management, control and responsibility may be transferred to any adventurer who will purchase, all the security for fairness, which is furnished by character and responsibility, is lost."[6]

The building of school houses, a penitentiary, and a city hall in Washington, D. C., were all financed by a single drawing of the National Lottery. Thereafter, a suit was filed against the city by the holder of a quarter ticket bearing the winning number for one fourth of the prize of $10,000. The Circuit Court for the District of Columbia, in 1829, disposed of the case with a ruling that the law authorizing the lottery did not empower its managers to sell fractions of tickets so as possibly to multiply causes of action against the corporation.[7]

In an effort to prevent its own citizens from investing their money in lotteries of other jurisdictions, the Virginia legislature on January 21, 1820, enacted a law forbidding the purchase or sale of any tickets within the state other than those of lotteries authorized by the laws of Virginia, under a penalty of one hundred dollars for each offense.

National Lottery Gives Rise to *The Cohens* v. *Virginia*

An alleged violation of the Virginia statute by two salesmen who had invaded the Old Dominion in quest of purchasers for tickets of the congressionally authorized National Lottery, gave Chief Justice Marshall, on appeal, an awaited opportunity to hand down a further opinion in a succession of decisions involving then original questions of constitutional law. The information filed in the trial court by the prosecuting attorney recited: "P. J. and M. J. Cohen . . . being evil-disposed persons," had violated the Virginia statute by selling to one William H. Jennings in the Borough of Norfolk two half and four quarter tickets "of the National Lottery, to be drawn in the city of Washington, that being a lottery not authorized by the laws of this commonwealth".[8] After disposing of the weightier constitutional question of the jurisdiction of the United States Supreme Court to review cases arising in state courts, Chief Justice Marshall disposed of the case on its merits by affirming the judgment of the Virginia court, holding that the National Lottery ordinance was "only co-extensive with the city" and of only local consequence, and that the Virginia court had the power to fine the Cohens for violation of the state law.[9]

An Act of New Jersey of February 15, 1797, entitled "An Act for Surpressing Lotteries," was a pioneer enactment of "blue-sky" legislation. Notwithstanding this statute numerous instances are recorded of Princeton University having been the express beneficiary of lotteries conducted in nearby states. However, a conveyance of land lying in New Jersey, founded upon a lottery consideration, was held to be void although the lottery was promoted and drawn in Pennsylvania where such activity was then legal.[10]

Lotteries Favored by Jefferson

Undoubtedly, the most eloquent essay composed on the subject was an undated paper written by Thomas Jefferson near the close of his life, entitled "Thoughts on Lotteries".[11] Jefferson, finding himself in serious financial difficulties, had requested of the Virginia Legislature a special act to authorize him to dispose of

4. *Clark* v. *Corporation of Washington*, 12 Wheat. 40 (U. S. 1827).
5. *Brent* v. *Davis*, 10 Wheat. 395 (U. S. 1825).
6. *Clark* v. *Corporation of Washington*, *supra*.
7. *McCue* v. *Corporation of Washington*, 3 Fed. Cas. No. 8,735, at 639 (C. C. D. C. 1829).
8. *The Cohens* v. *Virginia*, 6 Wheat. 264, 267 (1821).
9. *The Cohens* v. *Virginia*, *supra*.
10. *Ridgeway* v. *Underwood*, 20 Fed. Cas. No. 11, 815, at 760 (C. C. N. J. 1821).
11. "Memoir, Correspondence, and Miscellanies", from 4 *Works of Thomas Jefferson*, edited by Thomas Jefferson Randolph (Charlottesville, Va., 1829) at 428.

Wichers

William E. Treadway is assistant general counsel for the Atchison, Topeka and Santa Fe Railway at Topeka, Kansas. A native of Indiana, he graduated from the University of Indiana, received his LL. B. at George Washington University, and an S.J.D. at Michigan.

his property by lottery. He urged the point that his holdings were so extensive and the market then so depressed that no prospective purchasers could be found who would be able and willing to bid the true value of his belongings at any ordinary sale. Without the relief sought, he pictured "leaving unpaid those who have trusted to my good faith, and myself without resource in the last and most helpless stage of my life". On the other hand, he said that if permitted to dispose of his property by lottery, "all will be honestly and honorably paid, and a competence left for myself, and for those who look to me for subsistence". He asked to be allowed to part with his property "in a way which will offend no moral principle, and expose none to risk but the willing, and those wishing to take the chance of gain". He said,

> In this way, the great estate of the late Colonel Bird (in 1756) was made competent to pay his debts, which, had the whole been brought into the market at once, would have overdone the demand, would have sold at half or quarter the value, and sacrificed the creditors, half or three fourths of whom would have lost their debts. This method of selling was formerly very much resorted to, until it was thought to nourish too much of a spirit of hazard. The legislature was therefore induced, not to suppress it altogether, but to take it under their own special regulation. This they did, for the first time, by their Act of 1769, c. 17, before which time, every person exercised the right freely; and since which time, it is made unlawful but when approved and authorized by a special act of the legislature.[12]

Reciting in detail the accomplishments of his long lifetime, dedicated to public service, he launched into an argument in support of his request to the legislature, saying:

> It is a common idea that games of chance are immoral. But what is chance? Nothing happens in this world without a cause. If we know the cause, we do not call it chance; but if we do not know it, we say it was produced by chance. . . . Yet the morality of a thing cannot depend on our knowledge or ignorance of its cause. . . . If we consider games of chance immoral, then every pursuit of human industry is immoral, for there is not a single one that is not subject to a chance; not one wherein you do not risk a loss for the chance of some gain. . . . There are some other games of chance, useful on certain occasions, and injurious only when carried beyond their useful bounds. Such are insurances, lotteries, raffles, etc. . . . Money is wanted for a useful undertaking, as a school, etc., for which a direct tax would be disapproved. It is raised therefore by a lottery, wherein the tax is laid on the willing only, that is to say, on those who can risk the price of a ticket without sensible injury, for the possibility of a higher prize.[13]

He continued:

> "We have seen . . . between the years 1782 and 1820, a space of thirty-eight years only, . . . seventy cases,[14] where the permission of them has been found useful by the legislature, some of which are in progress at this time. These cases relate to the emolument of the whole state, to local benefits of education, of navigation, of roads, of counties, towns, religious assemblies, private societies, and of individuals under particular circumstances which may claim indulgence or favor. The latter is the case now submitted to the legislature"[15]. . . .

Mississippi Act Authorizes Lottery In Post-Civil-War Days

An interesting problem in the fields of constitutional law, corporations and contracts arose in Mississippi immediately following the War between the States. The legislature passed an act, approved February 16, 1867, entitled "An Act incorporating

12. Ibid. at 430.

13. Ibid. at 429.

14. As examples, Jefferson listed the following Virginia Acts authorizing lotteries: For education—1784, c. 34, for the city of Williamsburg to raise £2000 for a grammar school; 1789, c. 68, for Randolph Academy, £1000; 1789, c. 73, for Fauquier Academy, £500; 1789, c. 74, for Fredericksburg Academy, £4000; 1790, c. 46, for Transylvania Seminary, £500, and for Southampton Academy, £300; 1796, c. 82, for New London Academy; 1803, c. 49, for Fredericksburg Charity School; 1803, c. 50, for finishing Strasburg Seminary; 1803, c. 58, for William and Mary College; 1803, c. 62, for Bannister Academy; 1803, c. 79, for Belfield Academy; 1803, c. 82, for Petersburg Academy; 1804, c. 40, for Hotsprings Seminary; 1804, c. 76, for Stevensburg Academy; 1804, c. 100, for William and Mary College; 1805, c. 24, for Rumford Academy; 1812, c. 10, for the Literary Fund, to sell the privilege for $30,000 annually for seven years; 1816, c. 80 for Norfolk Academy, $12,000, Norfolk Female Society, $2000, and Lancastrian School, $6000. (Jefferson explained that the Acts of 1796, 1803, 1804 and 1805 "not being at hand, the sums allowed are not known.")

For waterways—1790, c. 46, for bridge between Gosport and Portsmouth, £400; 1796, c. 83, for clearing Roanoke River; 1804, c. 62, for clearing Quantico River; 1805, c. 42, for toll bridge over Cheat River; 1816, c. 49, for Dismal Swamp, $50,000.

For highways—1790, c. 46, for road to Warminster, £200, and for cutting a road from Rockfish Gap to Scott's and Nicholas' Landing, £400; 1796, c. 85, to repair certain roads; 1803, c. 60, for improving roads to Snigger's and Ashby's Gaps; 1803, c. 61, for opening road to Brock's Gap; 1803, c. 65, for opening road from Monroe to Sweet Springs and Lewisburg; 1803, c. 71, for road to Brock's Gap; 1805, c. 5, for road to Clarksburg; 1805, c. 26, for road from Monongalia Glades to Fishing Creek; 1813, c. 44, for road from Thornton's Gap.

For counties—1796, c. 78, for Shenandoah County; 1796, c. 84, for Gloucester County.

For towns—1782, c. 31, Richmond, for bridge over Shockoe; 1789, c. 75, Alexandria, to pave its streets, £1500, and 1790, c. 46, same, £5000; 1796, c. 79, Norfolk; 1796, c. 81, Petersburg; 1803, c. 12, Woodstock; 1803, c. 48, Fredericksburg, for improving its main street; 1803, c. 73, Harrisonburg, for improving its streets.

For churches—1785, c. 111, for completing church in Winchester and for rebuilding church in parish of Elizabeth River; 1791, c. 69, for benefit of Episcopal Society; 1790, c. 46, for building churches in Warminster, £200, Halifax £200, Alexandria, £500, Petersburg, £750, and Shepherdstown, £250.

For private societies—1790, c. 46, for Amicable Society in Richmond, £1000; 1791, c. 70, for Freemason's Hall in Charlotte, £750.

For private individuals—1796, c. 80, for sufferers by fire in Lexington; 1791, c. 6, for completing titles under Byrd's lottery; 1790, c. 46, to erect paper mill in Staunton, £300 and to raise £2000 for Nathaniel Twining; 1791, c. 73, to raise £4000 for William Tatham to enable him to complete his geographical work.

15. Ibid. at 433.

the Mississippi Agricultural and Manufacturing Aid Society," which provided: "The corporation shall have power to receive subscriptions, and sell and dispose of certificates of subscriptions which shall entitle the holders thereof to any articles that may be awarded to them, and the distribution of the awards shall be fairly made in public, after advertising, by the casting of lots, or by lot, chance, or otherwise, in such manner as shall be directed by the by-laws of said corporation; . . . and the said corporation shall have power to offer premiums or prizes in money for the best essays on agriculture, manufactures, and education, written by a citizen of Mississippi, or the most useful inventions in mechanics, science, or art, made by citizens of Mississippi."

The aesthetic was not overlooked in the Mississippi statute, in that the prizes to be awarded might consist of lands, books, paintings, statues, antiques, scientific instruments or apparatus, or any other property or thing which was ornamental, valuable or useful.

A provision of the Mississippi Act required the lottery corporation to pay the state university $5000 before the commencement of business, and $1000 annually thereafter, together with one-half of one per cent on the receipts derived from the sale of certificates. A subscription of $100,000 in capital stock, with $25,000 paid in, was required prior to operation.

On May 15, 1868, a convention adopted a new state constitution which was ratified by popular vote on December 1, 1869. It provided that "the legislature shall never authorize any lottery; nor shall the sale of lottery tickets be allowed; nor shall any lottery heretofore authorized be permitted to be drawn, or tickets thereon to be sold." The legislature on July 16, 1870, passed an act entitled "An Act enforcing the provisions of the Constitution of the State of Mississippi, prohibiting all kinds of lotteries within said State, and making it unlawful to conduct one in this State".

Supreme Court Upholds Act Outlawing Lotteries

The Attorney General of Mississippi, on March 17, 1874, filed an information in the nature of a *quo warranto* against those charged with carrying on a lottery or gift enterprise under the name of "The Mississippi Agricultural, Educational, and Manufacturing Aid Society". The society admitted its operation of a lottery but contended it did so in the exercise of the rights, privileges and franchises conferred by a corporate charter from the state, which could not be impaired by the later organic and legislative changes.

The case reached the United States Supreme Court for decision in 1879. The high tribunal, in upholding the state court's judgment ousting the society from its activity, found it necessary to make a nice distinction between the Mississippi situation and that found in the *Dartmouth College* case, decided by Chief Justice Marshall some sixty years before. The Court held that a corporate charter authorizing a lottery was nothing more than a license to enjoy the privilege conferred for the time, and on the terms specified, subject to future legislation or constitutional control or withdrawal.[16]

Pursuant to Act No. 25, 1868, of the Louisiana Legislature, the Louisiana State Lottery Company was organized as a corporation. The act provided that the company "shall pay the State of Louisiana the sum of forty thousand dollars per annum, which sum shall be payable quarterly in advance . . . which shall be credited to the educational fund; and said corporation shall be exempt from all other taxes and licenses of any kind whatever from the State, parish, or municipal authorities", and the company was given the sole and exclusive privilege of establishing and authorizing a lottery, selling tickets and distributing property by lottery.

The Act of 1868 was repealed by Act No. 44, 1879, which became effective on March 31 of that year. In December of the same year, Article 167 of the Louisiana Constitution became operative. This article, assuming that the Act of 1868 was still in force, gave the legislature authority to grant lottery charters, and with reference to the Louisiana State Lottery said "the charter of said company is recognized as a contract binding on the state, . . . except its monopoly clause, which is hereby abrogated". In litigation which reached the Supreme Court for decision in 1886, it was held that the effect of the constitutional article was "to revive the charter of the Louisiana State Lottery Company granted in the year 1868, notwithstanding its repeal by Act No. 44 of the year 1879, except as to the clause which confers upon it the exclusive privilege of establishing a lottery and dealing in lottery tickets, and to recognize the charter thus modified as a contract binding on the state for the period therein specified."[17]

In 1892, Louisiana became the last state to ban lotteries. Contemporaneously, the transmission of lottery tickets through the mails was prohibited by Congress. No state has since receded from its stand.[18]

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16. *Stone* v. *Mississippi*, *supra*.

17. *New Orleans* v. *Houston*, 119 U. S. 265 (1886).

18. As between certain states, the reflection of local sentiment may have entered into distinctions producing opposite opinions as to what does, and what does not, constitute a lottery. For instance, in Kentucky the betting on horses by a pari mutuel system has been held not to constitute a lottery (*Commonwealth* v. *Kentucky Jockey Club*, 238 Ky. 739 (1931)), while in Nebraska such a pari mutuel system of betting on the races was held to be a lottery and therefore unlawful (*State* v. *Ak-Sar-Ben Exposition Co.*, 118 Neb. 851 (1929); 121 Neb. 248 (1931)).

1948 Honorable Mention Ross Essay:

Steps To Restore Powers to Local Governments

by **Donald Kepner** • Assistant Professor of Law, University of Louisville

■ The "honorable mention" 1948 Ross Essay award accolade went to 32-year-old Donald Kepner (34 A.B.A.J. 552; July, 1948), who is teaching now as an Assistant Professor at the University of Louisville's School of Law. Mr. Kepner proposes specific actions and remedies, after cogently outlining the extent of the problems involved. The winning essay, by Frederic Solomon, was published in our July, 1948, issue (page 559).

■ The American federal system was neither a historical accident nor a product of political theorists, but was the creation of practical men striving to establish a strong government impregnable to foreign agression, yet accountable for the preservation of the rights of freedom-loving men.

The authors of the Constitution visualized that in reserving a high place in the new government for the states and their political subdivisions, they were securing the liberties of the people by establishing bulwarks against the invasion of individual rights by an irresponsible, centralized government. Having freed themselves from one sort of tyranny, the Constitutional fathers were not disposed to substitute another.

Although in theory our federal system remains unimpaired, in practice the states and local governments have abandoned and surrendered many of their responsibilities, destroying the balance of power measured by the Constitution. The preservation of the American federal system is dependent upon the restoration of the responsibilities and powers of the state and local governments; for the concentration of all the powers of government in a central state is incompatible with the fundamental principle of federalism.

The Nature of the American Federal System

A federal government, according to Professor Ogg, is one in which

> the political sovereign has made a distribution of the powers of government among certain agencies, central and divisional, and has done so through the medium of constitutional provisions which neither the central nor divisional government has made, and which are beyond the power of either to alter or rescind.[1]

Applying this principle to the American federal system, the people have established a constitutional government, apportioning powers between the national government and the states, and witholding from either the right to modify the original distribution by individual action.

The key to the aforementioned distribution is found in the language of the Tenth Amendment to the Constitution of the United States, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." This is the source of the generally accepted terms employed in distinguishing between the "delegated or enumerated" powers of the federal government, including those reasonably implied[2] therefrom, and the "residuary" powers of the states.

It has been understood that the delegated powers were to be strictly construed against the national government and the residuary powers liberally construed in favor of the states. While much of our constitutional law is based on this principle of construction, the theory is not supported by the facts. A constitutional authority in support of this proposition has stated: "State constitutional restrictions upon state powers are not liberally construed, and the powers granted to the national government are not strictly construed."[3]

Although not expressly mentioned in the Constitution, the states have certain concurrent powers,[4] developed from a distinction between the powers delegated to the national government and in terms prohibited to the states, and those powers granted to the national government but not expressly forbidden to the states. The

1. Ogg, F. A., *Governments of Europe* (1924), page 53.
2. *McCulloch* v. *Maryland*, (1819) 4 Wheat. 316.
3. Dodd, "The Decreasing Importance of State Lines", 27 A.B.A.J. 78, 80; February, 1941.
4. *Ex parte McNiel*, (1872) 80 U.S. 236, 240.

latter may be exercised concurrently with the national government by the states. Whether they are coordinate or subordinate, or whether they may be employed during the silence of Congress or only with the expressed consent of Congress, depends upon the subject matter over which the power operates, and upon the constituency of the Supreme Court.[5] But even a limited use of the concurrent powers gives the States fields in which they may assume their obligations.

Examination of the Fields of Respective Powers

Having determined the division of the powers, we turn our attention to the objects over which they may operate. The general pattern was drawn by James Madison, who stated in the *Federalist:*

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State government are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiations, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State.[6]

While the objects over which the national government may exercise power are restricted to those enumerated, the scope of the power in a permissible sphere is limited only by the prohibition against the infringement of individual rights. The powers to wage war, to enter into treaties, to regulate interstate commerce, and lately, to provide for the general welfare, along with the other delegated powers, are absolute. The extent of the residuary powers of the states can never be ascertained until Congress has exercised all of the powers granted by the Constitution.[7]

In conclusion it may be stated that the residuary powers of the States under our system of government were designed as limitations on the powers of the national government. Madison made this quite clear when he distinguished between the operation of powers and the extent of powers. As to the latter, he declared: "The proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only and leaves to the several states a residuary and inviolable sovereignty over all other objects."[8]

The Decline of the Powers of the States

Present-day students of American government agree that the concentration of powers in the national government has primarily resulted in the failure of the states to cope with the social and economic problems of an industrialized society. This failure may not be attributed to any "misconception of their political rights and powers"[9] but to the states' negative attitude toward the modern problems of government. Even the historic cry of "state rights" has been directed to the protection of vested interests from needed regulation by the national government, and has disregarded entirely consideration for the general welfare of the state. A generation ago Professor Briggs convincingly proved by citing example after example his assertion that, "Almost invariably state rights have been urged against some proposed measure. . . . In fact every advance of governmental activity has been resisted in the name of state rights."[10]

The failure of the states to assume responsibility has been deplored by their most ardent defenders. In a straight-forward discussion of the causes contributing to the states' decline, Justice Alexander, of the Supreme Court of Mississippi, concluded that, "As safe a judgment as any is that the union has expanded its powers because the states have spoken too often of states' rights when they should have been pondering states' duties."[11] He further related that state governments have not only failed to assume new duties but have disregarded old ones, the result being that, "The union has simply picked up a lot of loose powers which the states have left lying around."[12]

The states have lost power because of their failure to take cognizance of the mobility of business and life. The development of transportation and comunication has increased the range of interstate travel and trade defying destruction by any relatively small political division, although the unit may be as large as a state. In their attempt to solve new problems relating to trade, the states have usually employed a single device, the power of regulation.

State regulation of interstate commerce has not always been legitimate, for they, in the guise of health, safety, and revenue measures, have imposed regulations tantamount to tariffs for the protection of local business from out-of-state competition. Even more destructive is legislation establishing non-standard grades and specifications, impeding the free flow of commerce without benefitting the state in any appreciable manner.

The failure of the state legislatures to enact suitable laws to encourage and protect free trade and to control unlawful practices, not only invited retaliatory legislation from other states, but also forced Congress to act. The national government, upon entering the field, regulates both interstate commerce and the intrastate trade adversely affecting the former.

States Have Encouraged Federal Interference

The states have lost powers because they have encouraged rather than resisted the interference of federal agencies in local affairs. Subsequent events reveal the serious mistake

5. Grant, "The Nature and Scope of Concurrent Power," 34 *Col. L. Rev.* 995 (1934).
6. *The Federalist*, No. 45, at page 309 (Ford ed., 1898).
7. Dodd, *supra* note 3.
8. *The Federalist*, No. 39, at page 251 (Ford ed., 1898).
9. Martin, "The Growing Impotency of the States," 19 A.B.A.J. 547, 549; October, 1933.
10. Briggs, "State Rights," 10 *Iowa L. Rev.* 297, 301 (1925).
11. Alexander, "Waning Powers of the State," 34 *Geo. L. J.* 288, 291 (1946), 33 A.B.A.J. 3, January, 1947.
12. *Ibid.*

committed by the states in sanctioning the acceptance of financial assistance from the federal government by cities and counties, by-passing entirely state administrative officials. Millions of dollars, the records indicate, flowed from Washington to the county courthouses, detouring around the state capitols.

This type of action, thought to be speedy and efficient, added popular support for the proposal of a group of political scientists, that the states be abolished and their functions assumed by administrative regions.[13] This, of course, received support from many of the bureaucrats in the national government, who were enjoying their new-found power to meddle in local affairs by the exercise of the authority to approve or disapprove federal projects. Some of the federal agencies in the executive branch openly admitted lobbying in matters pending before state legislatures,[14] while others succeeded in persuading Congress to appropriate funds for certain projects so that the federal agency could control pet schemes in some of the stubborn states.

It must be kept in mind while analyzing this development that state boundaries have little, if any, relation to economic or social units. When the states hand the national government the major, if not all, of their policy-making functions, they are also transferring the only valid reason for their continuance as governmental units.

Dean Roscoe Pound, in commenting on the growth of bureaucracy and its destructive influence on the states, observed:

> A generation ago there would have been no need of arguing for the federal policy which we set up at the beginning and have steadfastly maintained. But lately the hegemony of the federal executive, economic unification of the country, if not of the world, and the tendency of power to assert and extend itself, have been pushing us toward centralized government at the expense of the State. Also many of the professors of political science seem to be doubtful of our complex system and to be bringing up a generation without faith in it.[15]

At this point we pause to examine the instrumentalities through which the national government assumed the responsibilities of the states. It may be stated, without defending any particular theory of constitutional construction or without passing on the efficacy of their action, that the Supreme Court of the United States has played an important part in the development of the powers of the national government.

It is relevant to note that the Supreme Court has been the arbiter in the conflict between the states and the national government. In appraising the role of the Court in the development of national supremacy, Professor Oliver Field has noted:

> The Supreme Court of the United States has been as impartial an umpire in national-State disputes as one of the members of two contending teams could be expected to be. This is not to impugn the wisdom or fairness of the Supreme Court. . . . The States, as members of the federal system, have had to play against the umpire as well as against the national government itself. The combination has been too much for them.[16]

While it has been suggested that the Supreme Court, having "neither the power of the purse nor the sword", has played an insignificant part in the development of the federal system, such an observation overlooks one of the basic principles of our form of government, characterized by Dean Pound as the "supremacy of the law, the doctrine that no one is above the law".[17] Without the approval of the judiciary, the executive and legislative branches of the national government would have undoubtedly encountered public resistance in the extension of their powers.

It should be observed, in fairness to the states, that some of the attempts to meet new social and economic problems by carrying on social experiments in what Justice Holmes termed their "insulated chambers"[18] were thwarted for a long period of time by the Supreme Court's construction of the due process clause of the Fourteenth Amendment. The denial of the states' right to experiment has been consistently followed by pressure for Congressional action resulting in legislation and in further extensions of national powers. It has been asserted that in many of these cases, "Freedom to experiment in the states might have precluded the demand for federal action or might have proved the unsoundness of specific policies".[19]

Donald A. Kepner is Assistant Professor of Law at the University of Louisville. Born in Illinois, he received a B.S. from the University of Illinois and a J. D. from the Lamar School of Law of Emory University at Atlanta, Georgia. He was admitted to the Georgia Bar in 1946.

Congress Also To Blame for Encroachments on States

The final blame, insofar as the national government is concerned for the expansion of federal powers, falls on the policy-making branch, the Congress. Through the full exercise of its constitutional power to regulate interstate commerce, and to tax and to spend,[20] Congress has intentionally entered into competition with the States in the exercise of

13. Graves, "The Future of American States," 30 *Am. Pol. Sci. Rev.* 24, 37 (1936).
14. Graves, *American State Governments* (1946) page 34.
15. Pound, "American Idea of Government," 30 A.B.A.J. 497, 499; September, 1944.
16. Field, "State versus Nation and the Supreme Court," 28 *Am. Pol. Sci. Rev.* 233 (1934).
17. Pound, *supra* note 15, at page 501.
18. *Noble State Bank* v. *Haskell*, (1910) 219 U. S. 104.
19. Long, "State Rights and the State Executives," 33 *Ill. L. Rev.* 42 (1938).
20. U. S. Const. Art. I, §8.

many functions of local government.

The appropriation of funds in the form of grants to the states has proved to be a potent weapon in extending the power and will of Congress into the smallest community. The effectiveness of the grants-in-aid is attested by an increasing use, for in the period from 1930 to 1940, federal payments to the states in the nature of grants increased from $135,000,000 to $580,000,000, or more than 300 per cent.[21]

The increase in the amount of federal appropriations has been paralelled by a decrease in the amount of state resistance. Professor McDonald reported in 1940: "Opposition to the principle of grants-in-aid seems to have disappeared; members of Congress no longer fill the pages of the *Congressional Record* with dire predictions that state sovereignty will soon be lost unless the federal government abandons its policy of 'systematic bribery'."[22]

The states have willingly traded powers for federal grants. Such an exchange, brought about by the unchecked use of the constitutional spending powers of Congress, has played a vital role in diminishing the powers of the states and their local governments.

Techniques To Enable the States To Assume Responsibilities

Having permitted the national government to seize and exercise powers constitutionally reserved to the states, the states and their local units of government now have the burden to demonstrate affirmatively willingness and ability to assume responsibilities before they can successfully insist that the national government relinquish powers the States have surrendered.

To counteract and eliminate the factors responsible for the states' lost powers and to establish state and local governments able and strong enough to assume the duties falling upon them, it is recommended that the states and their political subdivisions adopt the following proposals:

1. ***The Adoption of a Sound Fiscal Policy.***—The necessity of a sound fiscal policy is not an arguable issue if state and local governments are to self-finance the enlarged functions of government demanded by a twentieth-century society.[23] A state's fiscal policy, reported the Tax Committee of the Council of State Governments, should have the following objectives:

   a. To assist in providing maximum public service at a minimum cost.
   b. To have as a goal the maximum of equity to taxpayers in the raising of public revenues.
   c. To strengthen state and local governments in every possible way.
   d. To contribute a high level of business activity, high real national income, and a high level of productive employment.[24]

The Tax Committee, emphasizing the importance of proper financing, declared:

> Since the power of the purse is one of the most effective powers in government, maintenance of a sound locally-based system depends upon the ability of the States and their subdivisions to finance the bulk of their program adequately from their own resources. Democratic local government must rest on the foundations of sufficient stable revenues, equitably collected, carefully budgeted and wisely spent.[25]

Freedom from federal financial domination depends upon the states' ability to finance their own activities. It is worthy of note that the states are currently in a favorable financial position. Sound fiscal policies will enable them to maintain their solvent status and to re-acquire financial independence.

2. ***The Protection of Civil Liberties.***—The states, by assuring civil liberties to every citizen, will not only be able to work out their own problems in the manner best suited to local conditions, but will forestall the eventual interference of the federal government. Federal protection has been invoked only upon the occasion of a state's denial of constitutional rights. The states have a glorious opportunity in protecting and maintaining human liberties to create civic pride and loyalty.[26] The preservation of individual rights should be the first objective of a democratic government.

3. *Reorganization of the States' Legislative Bodies.*—A streamlined legislature is necessary in providing an effective and economical government, capable of handling the complicated matters of policy arising in the operation of a modern state. The fact that present-day legislatures are becoming aware of an ever-growing need for modernizations is evidenced by a recent report disclosing that twenty-eight legislatures were studying the question of reorganizations.[27] It is desirable that this research will culminate in widespread reforms, eliminating age-old evils in state legislative bodies.

4. *The Adoption of Uniform Laws.*—The uncertainty and variations in state law have produced interstate friction and agitation for national legislation. Disparity in the laws of corporations, marriage, divorce, and insurance, to mention a few, develop competition in lieu of cooperation among the states' governments. Uniform laws, whenever practical, should be the objective of the legislation through support of the National Conference of Commissioners on Uniform Laws and of the judiciary through participation in the American Law Institute. The trend toward uniformity both in the statutory and non-statutory law is a part of a broader movement, designed to substitute interstate cooperation for centralization in the national government. Aside from the broader implication, the work of the National Conference of Commissioners on

(Continued on page 442)

21. McDonald, "Federal Aid to the States: 1940 Model," 34 *Am. Pol. Sci. Rev.* 489 (1940).
22. *Ibid.*
23. The Council of State Governments, "Postwar State Taxation and Finance: I" (1947).
24. *Id.* at page 2.
25. *Id.*
26. See Radin, "The Function of the States," 25 Oregon L. Rev. 83, 101 (1946).
27. Perkins, "State Legislative Reorganization," 40 *Am. Pol. Sci. Rev.* 510 (1946).

State Regulation of the Right To Vote: The Rôle of the Supreme Court in Civil Rights

By **W. D. Workman, Jr.** • State Correspondent of the Charleston (South Carolina) *News and Courier*

■ The Fourteenth and Fifteenth Amendments prohibit the states from denying the equal protection of the laws or the right to vote to any person on account of race, color or previous condition of servitude. The Supreme Court recently refused to review a decision of a Federal District Judge that held that Negroes could not be prevented from voting in Democratic primary elections in South Carolina despite the fact that the state had no legal control over the primary. As a background for this decision, Mr. Workman outlines the history of the problem of Negro voting in the South from the time of the Reconstruction.

■ Whether it be regarded as a milestone or a millstone, South Carolina's celebrated "Waring decision" provides another legal landmark in the long fight of Southern Negroes to gain admittance to hitherto exclusively white Democratic parties.

The "Waring decision" was the ruling by Federal Judge J. Waties Waring, of the Eastern District of South Carolina, that Negroes could not be barred from voting in Democratic primaries on account of their color. The decision was made last year, and this year afforded the basis on which Negroes voted in Democratic primaries for the first time since Reconstruction days.

(An interesting exception to that rule lies in the fact that in the post-Reconstruction days, those Negroes who had voted for Gen. Wade Hampton in 1876 were permitted to vote in Democratic primaries. General Hampton led the movement which ousted the "carpetbaggers and scalawags" from the state and restored white-man government to South Carolina.)

A significant point which generally is overlooked in consideration of the Waring decision and those which preceded it is that the revised situation with regard to Negro voting is due not to any change in federal or state constitutions, nor to any material variation in the facts involved, but simply to the increasingly "liberal" outlook of federal judges.

The steps leading up to Judge Waring's decision were begun in 1946 when a Columbia Negro, George Elmore, was denied the right to participate in the Democratic primary election of August 13. This denial was based on rules of the Democratic Party of South Carolina, limiting membership in the party and participation in its primaries to white persons. Elmore, acting for himself and for others similarly situated, brought suit against John I. Rice, county chairman, and other Democratic officials within Richland County.

Guaranties of Amendments Underlie Problem of Negro Voting

The suit, sponsored throughout by the National Association for the Advancement of Colored People, was a civil action brought under several sections of the Federal Constitution and the federal code of laws. Underlying the entire cause of action, however, was the alleged violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

To get a clear concept of the delicate and difficult problems involved in the question of Negro voting, it is desirable to start with the Fourteenth Amendment and trace the developments since its adoption. The essence of the Fourteenth Amendment lies in these words:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifteenth Amendment is a companion of the Fourteenth, and applies the proposition of equality specifically to voting. It says:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Fourteenth Amendment was sponsored in Congress by a vengeful group of Republicans who sought to punish further the defeated South, while at the same time establishing a strong Republican Party by enfranchising the Negroes of the South. The Amendment also barred from public office most Southerners who had held office before the War and who had fought for the Confederacy. The Fourteenth Amendment was passed in Congress on June 16, 1866, and

submitted to the thirty-seven states then comprising the Union.

In 1866, the governments of the various Southern states had been reconstituted under Southern leadership and were resuming their places in the Union under the plan of restoration devised by President Lincoln before his assassination, and being administered after his death by President Andrew Johnson. In South Carolina, Benjamin F. Perry, who had opposed secession but had served his state in the Confederacy, was made provisional governor by presidential proclamation in June of 1865.

South Carolina's Post-War Constitution Restricted Suffrage to Whites

A Constitutional convention was held in September of that year. The leaders of that convention were for the most part men who had been leaders before and during the Confederate war. They adopted a temporary constitution which prohibited slavery and granted full legal protection to the Negroes, but which restricted suffrage to free white men, 21 years old and over.

The legislature which was elected pursuant to that constitution met in special session in October of 1865 and ratified the Thirteenth Amendment to the Federal Constitution—the amendment which abolished slavery.

However, when the Fourteenth Amendment was passed in Congress and submitted to the states, it was rejected within eight months by every Southern state except Tennessee. Delaware, Maryland and Kentucky also rejected the Amendment. South Carolina's vote in the state House of Representatives was ninety-five to one against ratification. The vote on the Senate rejection was not listed.

The Republican Congress reacted immediately and viciously to this wholesale rejection of the Fourteenth Amendment by the Southern states. In March of 1867, Congress overrode President Johnson's veto and placed the entire South under martial law. The laws which forced the tragic reconstruction era on South Carolina and the South required those states to form an acceptable government growing out of a constitutional convention made up of male citizens regardless of race, but excluding "such as may be disfranchised for participation in the rebellion."

Federal Law and Federal Bayonets Force Adoption of Negro Voting

This martial law also barred Southern states from representation in Congress until Negroes were guaranteed voting rights, and until the Fourteenth Amendment was ratified. Faced with federal law enforced with federal bayonets, the white Southerners were helpless to prevent their state governments from falling into the hands of the Negroes, the carpetbaggers and the scalawags.

When the question of a new constitutional convention was put before the people of South Carolina in 1867, the 3000 white people who opposed it were crushed under a Negro vote of nearly 69,000. The resulting convention was made up of seventy-six Negroes and forty-eight white Republicans. Incidentally, fifty-nine of those Negroes and twenty-three of the whites paid no taxes whatever.

Out of that misbegotten convention there came the Constitution of 1868. And out of that Constitution came the general election which sent a predominantly black group of Republicans to the General Assembly. It was this legislature which ratified the Fourteenth Amendment. Similarly constituted legislatures in the other Southern states, put in power through federal force, ratified the amendment, and in July of 1868 it was declared adopted.

Some years after the white people of South Carolina had restored decency to the state government under the leadership of Wade Hampton, there was called the Constitutional Convention of 1895. The Constitution under which the state operates today was adopted by that convention, and it granted suffrage to all male citizens, regardless of race.

Despite the right to vote in general elections, guaranteed by both federal and state constitutions, the political leaders of Southern Negroes in the last twenty-five years have not sought to muster a respectable vote in the general elections, but with increasing success have tried to gain admittance to the Democratic Party. That effort, which seems now consummated with the Waring decision, has been particularly noticeable in Texas, and the cases originating in that state show clearly the changing attitudes of successive United States Supreme Courts.

Nixon v. *Herndon* Is the First in Line of Negro Rights Cases

Back in 1923, the Texas legislature passed a statute prohibiting Negroes from voting in Democratic primaries. A Negro named Nixon brought suit against the election officials, alleging violation of his rights under the Fourteenth Amendment. (*Nixon* v. *Herndon*, 273 U.S. 536.) The case went to the United States Supreme Court and the Court held unanimously that the state had denied Nixon the equal protection of the laws guaranteed by the Fourteenth Amendment.

Texas repealed that law in 1927, and passed one permitting every political party in the state to prescribe its own qualifications for membership. The state executive committee of the Texas Democratic Party resolved that white Democrats and no others would be allowed to participate in the party primaries. Another lawsuit was brought by the same Negro, Nixon (*Nixon* v. *Condon*, 286 U.S. 73), to gain access to the Democratic primaries. When this case reached the Supreme Court in 1927, the Court ruled in a five-to-four decision that the party's right to determine its membership qualifications was vested not in the executive committee but in the state convention.

As a result of this ruling, the Texas Democrats, in their 1932 convention, adopted a resolution limiting membership in the Democratic party and participation in its deliberations to white citizens. In 1934, a Negro named Grovey brought suit to test this party exclusion of Negroes. *Grovey* v. *Townsend*, 295 U.S. 45 (1935). Grovey sued a county clerk who had refused him an absentee ballot for a Democratic primary on the grounds that Grovey was a Negro and ineligible to vote in the primary.

Supreme Court Rules for State in *Grovey* v. *Townsend*

The *Grovey* case reached the Supreme Court in 1935 and was settled in favor of the Democratic party by one of the greatest courts of recent years. Charles Evans Hughes was Chief Justice of that Court, and his Associate Justices were Willis Van Devanter, James Clark McReynolds, Louis D. Brandeis, George Sutherland, Pierce Butler, Harlan Fiske Stone, Owen J. Roberts and Benjamin N. Cardozo.

That Court said the petitioner had not been denied any rights guaranteed him by the Fourteenth and Fifteenth Amendments, and upheld the right of the Democratic Party to prescribe its own rules of membership. That decision settled, though for the time being only, the identical issue raised in the South Carolina case of *Elmore* v. *Rice*, that is, the right of a political party to fix its own rules of membership. Because of the great respect in which that court was held, and because of the clear-cut statements made in deciding the critical question, several pertinent excerpts are quoted below:

> While it is true that Texas has by its laws elaborately provided for the expression of party preference as to nominees . . . it is equally true that the primary is a party primary; the expenses of it are not borne by the state but by the members of the party seeking nomination; the ballots are furnished not by the state but by the agencies of the party; the votes are counted and the returns are made by the instrumentalities created by the party; and the state recognizes the state convention as the organ of the party for the declaration of principles and the formulation of policies. . . .
>
> The state . . . though it has guaranteed the liberty to organize political parties, may legislate for their governance when formed and for the method whereby they may nominate candidates, but must do so with full recognition of the right of the party to exist, to define its membership, and to adopt such policies as to it shall seem wise. . . .
>
> We are not prepared to hold that in Texas the state convention of a party has become a mere instrumentality or agency for expressing the voice or will of the state. . . .

The decision pointed out that "the general election is a function of the state government and discrimination by the state as respects participation by Negroes on account of their race or color is prohibited by the Federal Constitution. . . ." It added, however, that the state need not concern itself with party membership.

Grovey v. *Townsend* Overruled by *Smith* v. *Allwright*

Texas Negroes would not accept the *Grovey* v. *Townsend* decision as final however, and in 1943 another suit arose out of a Negro's being refused suffrage in a primary election. This was the now celebrated case of *Smith* v. *Allwright*, 321 U.S. 648 (1941). By this time, the make-up and judicial outlook of the Supreme Court had materially changed under an influx of new justices appointed by President Roosevelt, and the *Grovey* decision was overruled.

In the *Allwright* case, the court held that the Fifteenth Amendment had been violated, and said that the action of the party in conducting a primary election constituted state action. In other words, the decision made no distinction between general and primary elections, saying that since primary elections were conducted in Texas under statutory authority of the state, then the action of the party was, in effect, the action of the state. The language of the Court is important in that case because it provided the basis on which South Carolina subsequently acted in repealing its primary laws. A significant portion of the decision, delivered by Justice Reed, follows:

> We think that this statutory system . . . makes the party . . . an agency of the state insofar as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. . . .
>
> When primaries become a part of the machinery for choosing officials . . . the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes. . . . This is state action within the meaning of the Fifteenth Amendment.

Justice Roberts Dissents Vigorously On Overruling *Grovey* Case

This 1944 decision of the Supreme Court drew an acid dissent from Justice Owen J. Roberts, who was a member of the old Hughes Court which had ruled otherwise in the *Grovey* case. Justice Roberts said:

> I have expressed my views with respect to the present policy of the court freely to disregard and to overrule considered decisions and the rules of law announced in them. This tendency, it seems to me, indicates an intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors.

Allwright Decision Leads South Carolina To Repeal All Primary Election Laws

When the *Allwright* decision was announced, the South Carolina legislature was called into special session by then-Governor Olin D. Johnston and repealed all statutes relating to primary elections. In their effort to salvage their white party, the legislators were guided by the exact language of the Supreme Court. Since the Court had held that party action was in effect state action because it was prescribed by state statute, the South Carolinians reasoned with logic that if there were no statutory controls over the party, then its actions could not be considered those of the state.

This line of reasoning was completely rejected by Judge Waring when the *Elmore* case was brought before him. He rejected also the 1935 Supreme Court decision in the case of *Grovey* v. *Townsend*, and turned instead to the *Allwright* case of 1944 and the case of *United States* v. *Classic*, 313 U.S. 299 (1941). The *Classic* case, which arose in Louisiana, resulted in this opinion of the Supreme Court:

> When the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected [by the constitution].

The complete change in attitude between what might be called the old court and the New Deal court was recognized by Judge Waring. He referred to the *Grovey* v. *Townsend* case in passing, but hastened to add:

> But the views of the Supreme Court of the United States in regard to these matters have suffered a drastic and complete change. And so far as we are concerned with the law of the land, except for an interest in prior views showing changes and development of the law, we need hardly look back of 1941 when the famous case of *United States* v. *Classic* was decided, and a few years later, in 1944, *Smith* v. *Allwright*. These two cases now completely control and govern the matters under discussion.

Right of Negro To Vote Upheld in Georgia

Besides citing the *Classic* and the *Allwright* cases in arriving at his own decision, Judge Waring also referred to the Georgia case of *Chapman* v. *King*, 154 F. (2d) 460 (1946). That case involved the same old issue of a Negro's being denied participation in a white Democratic primary. The United States Supreme Court refused to review this case after it had been acted upon by both the District Court and the Circuit Court of Appeals. (That same procedure was followed later by the Supreme Court when the South Carolina case reached it on appeal.) The Fifth Circuit Court of Appeals disposed of the Georgia case with a decision upholding the right of a Negro to vote in the Democratic primary. That opinion, handed down in March of 1946, was based on this reasoning:

> We think . . . that the State, through the management it requires, collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery. The exclusion of voters made by the party by the primary rules become exclusions enforced by the State, and when these exclusions are prohibited by the Fifteenth Amendment because based on race or color, the persons making them . . . violate under color of state law a right secured by the Constitution and laws of the United States. . . .

As a result of that *Chapman* v. *King* decision, Negroes are now voting in Georgia primaries. As a result of the *Smith* v. *Allwright* decision, they are voting in Texas primaries, and as a result of the *Classic* decision, they are voting in Louisiana primaries. They are now voting in South Carolina by virtue of the Waring decision, in which Judge Waring had this to say:

> I am of the opinion that the present Democratic Party in South Carolina is acting for and on behalf of the people of South Carolina; and that the primary held by it is the only practical place where one can express a choice in selecting federal and other officials. Racial distinctions cannot exist in the machinery that selects the officers and lawmakers of the United States; and all citizens of this state and country are entitled to cast a free and untrammelled ballot in our elections, and if the only material and realistic elections are clothed with the name "primary", they are equally entitled to vote there.

He added that "the plaintiff and others similarly situated are entitled to be enrolled and to vote in the primaries conducted by the Democratic party of South Carolina".

Supreme Court Refuses To Review Judge Waring's Holding

The Waring decision was handed down July 12, 1947. It was promptly appealed by the Democratic Party of South Carolina but was affirmed by the Fourth Circuit Court of Appeals. Thereafter, the case was appealed to the United States Supreme Court, but the high tribunal refused to review the case.

Although Judge Waring's decision said that Negroes "are entitled to be enrolled and to vote," his order putting that decision into effect said only that "qualified Negro electors" would be allowed to vote in Democratic primaries. The state executive committee of the Democratic Party decided to comply with the literal letter of the Waring order and not with the obvious spirit of the decision. Consequently, when the state Democratic convention met on May 19, 1948, there was put through a revision of party rules which would permit qualified Negro electors to vote in the primaries (upon presentation of a general election registration certificate as evidence of qualification) but which denied them membership in the Democratic party itself.

The Negroes, through the Progressive Democratic Party and the National Association for the Advancement of Colored People, immediately protested that they were entitled to "full and complete participation in all party matters" and threatened another suit. Further court action was brought early in July after the Beaufort county executive committee had purged its enrollment books of all Negroes' names. One of those Beaufort Negroes, David Brown, sought an injunction to prevent Democratic Party officials from refusing to enroll Negroes.

Judge Waring granted a temporary restraining order, and in that order covered a remarkable number of things. He not only opened the enrollment books of the party to Negroes, but ordered:

(1) That Negroes be accorded full and complete participation in the Democratic Party.

(2) That Negroes not be required to present registration certificates to vote in the August primaries (as required under rules adopted by the 1948 Democratic convention).

(3) That Negroes not be required to take the oath of allegiance to principles of the party formulated by the state convention.

(4) That no prospective voters be required to take that oath.

(5) That the party's enrollment books be reopened to all individuals, and that the books be kept open for certain hours on certain days for a given period of time.

The extent to which Judge Waring went in his temporary injunction brought protests from the Democratic Party in its answer to the *Brown* suit. Attorneys for the party contended that Judge Waring, among other things, had no authority to open the

(Continued on page 439)

"Books for Lawyers"

THEIR FINEST HOUR. *By Winston S. Churchill. Boston: Houghton Mifflin Co. 1949. $6.00. Pages xvi, 751.*

"History with its flickering lamp stumbles along the trail of the past, trying to reconstruct its scenes, to revive its echoes, and kindle with pale gleams the passion of former days. . . . The only guide to a man is his conscience; the only shield to his memory is the rectitude and sincerity of his actions."

These words of Winston Churchill, spoken in tribute to the late Neville Chamberlain, serve to suggest that History can be aided in its reconstruction of the past when those who make it know as well how to write it. No reader of this book can fail to live again those "terrible, tremendous years" which Mr. Churchill so skillfully evokes. "The Battle of France", "The Deliverance of Dunkirk", "Home Defence", "The French Agony", "The Battle of Britain", "Ocean Peril", "Desert Victory"—even the chapter headings are evocative.

The bulk of the volume deals with the war—when "the British people held the fort alone". Of legal matters there is little; of international politics more, but, not unnaturally, it was the winning of the war which interested Mr. Churchill.

To those accustomed to regarding Mr. Churchill as an Olympian immersed in large affairs of state, the sixty-seven-page appendix containing the "Prime Minister's Personal Minutes and Telegrams, May-December, 1940" will come as an amazing and fascinating revelation of his interest in detail: the proximity fuse; whether air communiqués were being penned "in accordance with the best authorities on English"; whether the *Hood* should loll about Gibraltar Harbor; whether there should be another day of prayer and humiliation; how much glass had been broken in the blitz; what is the average time a homeless person remains in a rest center; why private secretaries have been permitted to acquire the habit of addressing each other in official papers by their Christian names when it was hard enough to follow them by their surnames; whether there could not be more bands and parades in the streets since they were so beneficial; whether De Gaulle had enough time on the radio; whether Major J. ought not to be promoted to Lieutenant-Colonel since it would "give him more authority".

The chapter on the destroyer-bases deal of 1940 shows that, contrary to certain persons in the United States, Mr. Churchill was under no illusions as to its being a flagrant violation of international law. The transfer of destroyers, he writes, "was a decidedly unneutral act" which would "have justified the German Government in declaring war upon" the United States. President Roosevelt, however, "judged that there was no danger, and I felt there was no hope". It was "the first of a long succession of increasingly unneutral acts" (page 404). Yet, for public consumption, it seemed desirable to state that "only very ignorant persons would suggest that the transfer of American destroyers to the British flag constitutes the slightest violation of international law" (page 415). It might be wise for the United States, in any peace treaty with Germany, to stipulate non-responsibility for such acts.

If Mr. Churchill has erred in detail or been too harsh in his judgments—as some of the French leaders who must live with their consciences have suggested—History will place this man's very personal history in perspective. Yet, as he said of Chamberlain with the shield of rectitude and sincerity, "however the Fates may play, we march always in the ranks of honour".

HERBERT W. BRIGGS
Cornell University
Ithaca, New York

LEGAL PHILOSOPHY FROM PLATO TO HEGEL. *By Huntington Cairns. Baltimore: The Johns Hopkins Press. 1949. $7.50. Pages xii, 583.*

The stated purpose of the author of this book is to set forth impartially the views of Plato, Aristotle, Aquinas, Francis Bacon, Hobbes, Spinoza, Leibnitz, Locke, Hume, Kant, Fichte and Hegel and of Cicero as to law, what problems they considered significant and the solutions they proposed.

In 1935 the author looked at law from the standpoint of the social sciences in *Law and the Social Sciences;* in 1941, from that of logic and the empirical sciences in his *Theory of Legal Science.* The purpose of these two volumes and the one under review was "to construct the foundation of a theory of law which is the necessary antecedent of a possible jurisprudence".

The scholarship and the sincerity of the author are well known. Whether or not, however, the views of the philosophers have been set forth without any subconscious distortion because of the author's own views, whether or not his restatement is accurate in all its details, is a task for the professional philosopher with leisure and plenty of time to write his review rather than for the practicing lawyer whose brothers at the Bar may ask him: What do you think of this book? What, if anything, is there in it for me? Will it help the profession to fulfill its responsibilities to society in a critical age and if so, how?

Philosophers ever since the time

of Socrates have been regarded by the average man as queer people indulging in useless intellectual speculations and wandering about in the clouds of unreality. Analytical jurisprudence concentrated on the analysis of itself from the standpoint of internal logical consistency only and aimed at self-sufficiency divorced not only from the social sciences but from philosophy. The physical sciences, generally dominated by the positivists, in the nineteenth century and early part of the twentieth following Comte sought to absorb philosophy in the other sciences. They and the social sciences which aped the physical because of the spectacular achievements of the latter as evidenced in invention, industry and man's conquest of his material environment, turned their backs upon philosophy. And then in a revolutionary era man discovered that facts would not take the place of philosophy, that science had become a Frankenstein monster in an atomic age, that man needed more than expediency and a worship of short-term ends to prevent the final catastrophe of a third world war. And in the house of the law, as has always been the case in a time of legal growth, men looked for an integrating philosophy.

This book, while useful as a summary, will not give them an integrating philosophy, and it may well be that some lawyers who read this book may turn from philosophy with revulsion. They may be like many a college student exposed to primarily *memoriter* courses in the history of philosophy, and end up by saying to themselves with jesting Pilate, "What is truth?" They may not stay for an answer. Especially if affected by a skeptical and relativist climate of opinion, they may say: "If these so-called intellectual giants cannot arrive at the truth, what chance is there for mere 'boob-freshman me'?"

For lawyers may recall the words of James Bryce in his *Studies in History and Jurisprudence*, written in 1901 about works in the field of what he calls metaphysical legal science:

> The worth of the books . . . will be estimated differently by those who enjoy specialization for its own sake and by those who think it a waste of time unless it bears fruit in truths of definite practical utility. If the latter criterion of value be accepted, the importance of these treatises cannot be placed very high. The foliage is luxuriant but the fruit scanty. A vigorous and ingenious mind will doubtless, in whatever way he may treat the subject, stimulate thought in the student, and will probably throw out just and suggestive remarks which may be treasured as practically helpful.
>
> As some brilliant thinkers, at the head of whom stand Immanuel Kant and G. W. F. Hegel, have adopted this method in handling the Philosophy of Law . . . . it would be foolish and presumptuous to disparage their treatises. Nevertheless, the general conclusion of English lawyers has been that not much can be gathered from lucubrations of this type. They are decidedly hard reading; and the harvest reaped is small in proportion to the time spent. Threading its way through, or, as some would say, playing at hide-and-seek in a forest of shadowy abstractions, this method keeps too far away from the field of concrete law to throw much light on the difficulties and controversies which the student of any given system encounters.

Every man writes his book in his own way. With respect, however, this reviewer thinks that so far as the author's expression of his own views is concerned, a distinct aid to clarity of thought and of ease and accuracy of comprehension by the reader would be given by resort at the outset to the old device of definition. "Philosophy" has meant every striving towards knowledge, the love of wisdom. Plato calls it "the acquisition of knowledge". Aristotle says it is concerned with first causes and principles. Juvenal spoke of "benign philosophy" which "by degrees strips from us most of our vices, and all our mistakes". To Seneca it was the art of a life in accord with reason; for Cicero, the source of happiness and a shield against the slings and arrows of outrageous fortune; for Schlegel it was an art and not a science; for Guedalla "the study of other people's misconceptions". For Holmes, as quoted by Biddle, its business was to show that we are not fools for doing what we want to do. For this reviewer, it is a science which by the natural light of reason studies all things in their first causes or principles, in their ultimate reasons.

So, too, "jurisprudence" is a word of many meanings. Though Austin speaks of it as the philosophy of positive law, he treats it as a science, the analysis of legal concepts. He complains of the use of "the inspiring quadrasyllable" as the equivalent of law. Pound takes a similar position complaining of the "polysyllabic synonym". Bryce and the dictionary speak of it indifferently as either the science of law or the philosophy of law.

Mr. Cairns, in his chapter headed "Philosophy and Jurisprudence" at page x, says that jurisprudence is "a branch of philosophy" but at page 3 he says that in its later days it claimed to be one of the social sciences. At page 15 it is definitely "among the social sciences". "Philosophy's effort", he says at page 4, "like that of jurisprudence, is thus directed at knowledge. But the knowledge it seeks, even of the legal process, is different from that sought by jurisprudence in the sense that the questions it asks will not be the same, or if they should coincide, the answers proposed may be different". Going back to the statement at page x that jurisprudence is "a branch of philosophy", we contrast it with the statement at page 3 that "it [jurisprudence] has never lost contact with philosophy to the same degree as the other social sciences". So one comes back to the words of Bentham: "Jurisprudence is a fictitious entity nor can any meaning be found for the word but by placing it in company with some word that shall be of significance as a real entity". Thus today one might speak of either philosophical or sociological jurisprudence but this points the need of definition if the general term be used.

On the whole, this book does not seem to this reviewer to indicate any particular confidence in any kind of jurisprudence or in philosophy, so

far as the author is concerned, or perhaps we should say, optimism. He writes at page 6, "Both philosophy and jurisprudence share the characteristic that they have perfected no techniques either for the discovery of knowledge or for its successful application once that goal has been reached. . . . Their primary instrument is reason, which in view of the attacks upon it, even by philosophers themselves, cannot be taken for granted as a self-evidently valid tool. Philosophy has not provided jurisprudence with a critical theory of ideals, nor has jurisprudence developed one of its own".

And finally the author makes a statement that should be borne in mind by all who read his writings. At page 563 he speaks of "those suppositions which are immediately connected with the effort to explain the legal order. In the long run, the validity of more remote suppositions, *e.g.*, that a piecemeal analysis of a legal system will lead to knowledge must be faced; but the investigation of their standing lies elsewhere". And then he concludes—and this is important—"Legal philosophy is not concerned with these suppositions as true or false, but as hypotheses which are to be tested by their capacity to promote the solution of the problems of the legal order". This, of course, is pragmatism and Dewey. And so one may conclude that the philosophy that the author has in mind is pragmatism. This is not the place to discuss the question whether the chaotic condition of American law is due in part to two post-Hegelian philosophers, James and Dewey; nor to too quick a reliance by the legal profession upon a pseudophilosophy which substitutes expediency for coming to grips with the problem of ultimates. It is merely a suggestion that any writer's discussion of the field of the philosophy of law should be critically approached in the light of what is deemed to be that author's concept of philosophy itself.

BEN W. PALMER

Minneapolis, Minnesota

THE PEOPLE KNOW BEST: THE BALLOTS VS. THE POLLS. *By Morris L. Ernst and David Loth. Washington, D. C.: Public Affairs Press. 1949. $2.50. Pages 169.*

When, on November 2, 1948, longshot Harry S. Truman broke the winner's tape to nose out Thomas E. Dewey in the forty-first running of the Presidential Sweepstakes, he likewise broke open the sluice gates of literature to an overpowering torrent of comment and criticism on the failure of political prognostication.

After the radio comedians had formulated and expressed the obvious observations, the magazines became deluged with a series of indictments gleefully pointing up the fact that our prophets had feet of clay. Then the "I told you so's" made their literary appearance, closely followed by the pseudo-pseudo-experts who present methods for predicting affairs of state with the same equanimity as they compound schemes to break the bank at Monte Carlo.

The "answers" were soon forthcoming. The prophets, who, oddly enough, were still with honor in their own country, hastened like surgeons to defend the success of their operation—despite the death of the patient. After a Thanksgiving-Week diet of roast crow, fried crow, stewed crow and crow hash, Dr. George Gallup hurried to explain in print the "whys" and "wherefores" of his misfeasance, and Elmo Roper took pen in hand to reiterate his faith in polls and pollsters.

At the present stage of critical comment, the Monday-morning quarterbacks have turned to the book form as their medium. And it is through this medium that the student of political affairs is met with the more detailed, accurate and scientific analyses of the shortcomings of our methods of predicting elections. Regretfully, none of the published pieces have as yet adequately explained to the man-on-the-street the short and simple answer to the short and simple question of "what happened?"

By all odds, the most readable commentary to come forth on this subject is the little volume which authors Ernst and Loth have dedicated to their favorite pollster, Harry S. Truman. Notwithstanding their obvious bias toward the man from Missouri, their critique makes good reading for those who take an interest in public affairs, regardless of political affiliations. Notwithstanding the absence of the searching and the profound, the book contains enough data and enough food for thought to at least start another cycle of commentary on election crystal-gazing.

Messrs. Ernst and Loth are angry about everything connected with the 1948 elections except the final returns. They develop the thesis that the polls and press conspired together to delude the American public as to the probable election results. They woefully decry the absence of any nonpolitical man of steel strong enough to stand against the tide and predict a Democratic victory. They are certain that "our own [American] concentration of power over the pipelines of thought—movies, radio and press—presents a danger. . . ." They are fearful that we are developing a cynical attitude toward our various media of information and that the end result will be a cynical attitude toward the value of free speech, and consequently a cynical attitude toward democracy itself. They are convinced that we will eventually distrust the giant voice of public information or be "lulled once more into a trusting belief that no more mistakes will be made"—and that either course of action will result in losing the essentials of freedom.

There need be no discussion as to the logic of their contentions or the possible *non sequiturs* which led them to their conclusions. Suffice it to say, Messrs. Ernst and Loth seem to constitute a team of Cassandras whose wail of alarm is fated to go unheard. The American people didn't ignore the opinions of columnists, commentators, editorial writers and pollsters before the elec-

tion and they are not ignoring them now. If Americans are inclined to take their literary pundits with a quantity of salt, they should not be declared guilty of indictable cynicism. And there seems to be no real decline in the critical activities of the American people where the self-appointed experts are concerned.

The election itself helps to refute the thesis of this book. No less than 79 per cent of the press supported Dewey; only 10 per cent were in the Truman camp. A simple study of the final returns should dispose of any theory that the public can be instructed on the proper way to stuff the ballot boxes.

But this thesis of the authors is by no means the most significant part of their volume. They do furnish the reader with a veritable wealth of palatable data and statistics on public opinion and the media which attempt to guide and affect it. One-third of their book is devoted to excerpts from the labors of columnists and commentators on the 1948 elections.

The authors have prepared a fine analysis on the defects of our polling methods, and they righteously condemn the pollsters for not revealing the details of said methods. "We still don't know the techniques—that is, the interviewers in type, in number, in locale; the persons interviewed, in classes, in number or location; the statistical compilations with adjustment, weighting factors, the possible variables and, in fact, any of the bases for the discussion and the conclusion." This is their cry on page 144. And how much credence, they ask, should we give to an average nation-wide election poll in which only 3000 persons are interviewed?

Their criticism of the press and radio is also well justified. There is no excuse for the complacency with which the editors, reporters and commentators accepted the judgment of the pollsters. But Messrs. Ernst and Loth are wrong when they suggest that the individual men of the newspaper and the radio should have made their own surveys.

The story is told of the Omaha feed company which offered its customers their choice of feed bags printed with donkeys and feed bags printed with elephants. "The company thought the way in which the farmers chose might be a good indication of how they would vote. Customers called for donkeys in such numbers that the company decided to call off this 'feed bag' poll, saying that it was obviously unreliable, but they kept the figures. After the election it turned out that the 'feed bag' poll had been accurate within a fraction of a percentage point." (Page 32.)

The story is told of the poll made by self-confessed Saloon Editor, Earl Wilson of the New York *Post*. On July 16 he had written:

> President Truman is leading Governor Dewey in the Wilson Poll . . . taken in 10 Broadway restaurants, cafes and bars last night . . . After the 100 people were polled, this was the score:
>
> | | |
> |---|---|
> | Truman | 45 |
> | Dewey | 41 |
> | Wallace | 7 |
> | Thomas | 1 |
> | Not voting | 6 |
>
> (Page 149.)

Authors Ernst and Loth feel that these stories should have indicated to the prophets that something was amiss—that something "might" be wrong with the findings of Gallup and Company—that the honest reporters should have hit the road themselves to test out public opinion.

But there is a real question as to whether surveys should be made by the press and radio. The "stories" cited above certainly do not constitute a basis for the forecasting of elections; they do not even challenge the efforts of the professional pollsters. Ernst and Loth agree to that, at least.

Despite the blunder of November 2, 1948, the present existing polls are still the most scientific sources of public opinion in America. And the job of the commentators is to evaluate their significance and criticize their methods—not to go into the polling business. The task of press and radio is to point out the factor of fallibility on the part of the pollsters; they must explain that their news sources are always colored by the findings of the men who conduct the public opinion surveys. The job of the commentator is to analyze the final results of the polls—not to set up new polling agencies.

Despite criticisms and despite errors the polls are here to stay. Without a doubt the twentieth century will abound with surveys which will count noses and predict elections. The events surrounding the Truman victory of 1948 might even cause Federal Judge Meekins to reverse part of his decision in *Hampton* v. *North Carolina Company*, 49 F. Supp. 625. In his opinion, Judge Meekins wrote the following:

> Great hunters lived before Nimrod, who was a mighty one before the Lord, and great fishermen before Izaak Walton, whose followers are as numberless as the sands of the sea—not counting the leaves of the forest, as if anybody ever did, or could, except the quondam *Literary Digest*, which polled itself to death in the late Summer and middle Fall of 1936.

ALBERT P. BLAUSTEIN
New York, New York

LINCOLN'S SECRETARY: A BIOGRAPHY OF JOHN G. NICOLAY. *By Helen Nicolay. New York: Longmans, Green and Co., Inc. 1949. $5.00. Pages x, 363.*

All of the many who are today interested in Lincoln know of, but few have read, the monumental ten-volume biography of Nicolay and Hay. This accurately titled "history" is ascribed to Lincoln's "secretaries". Actually, John G. Nicolay was Lincoln's presidential secretary and John Hay his assistant. For understandable reasons Hay is better remembered. He became a minor literateur: his *Castilian Days* is still read; although he tried to forget his *Pike County Ballads*, no survey of American literature omits them—especially "Jim Bledsoe of the Prairie Bell". Moreover, Hay's distinguished diplomatic career—Ambassador to the Court of St. James and Secretary of State—has placed him in American history and has been responsible for more than one biography of him.

Nicolay's less notable life has been succinctly and accurately sketched by

the accomplished Lincoln student and author, J. G. Randall, in the *Dictionary of American Biography*. Here, however, for the first time is the Nicolay story fully told—told by his daughter and only child except a son who died in infancy.

The Nicolay family emigrated from Bavaria to this country. After some wandering they settled at Pittsfield, Pike County, Illinois. There it was that Nicolay met John Hay, who was being prepared to enter Brown University; there they formed the friendship that endured as long as they both lived.

Nicolay was self-educated in the office of a country newspaper—the Pittsfield *Free Press*—which he entered as a typesetter and of which eventually he became the proprietor. In 1856 Nicolay sold the *Free Press* and became a clerk for the Secretary of State in Springfield. There he formed a friendship with Lincoln, and by him was appointed private secretary upon Lincoln's nomination for the presidency. Nicolay obtained Hay's appointment as assistant secretary,[1] "and", as Professor Randall puts it, "the two chums thus stepped together upon the escalator of fame." During Lincoln's presidency they shared a room in the White House and enjoyed the intimate friendship of the President.

A Lincoln appointee, Nicolay for four years (1865-1869) served as American consul in Paris. In 1872 he became marshal of the Supreme Court of the United States and continued in office until 1887. This was then almost a sinecure, and from 1875 until 1890 Nicolay collaborated with Hay on the Lincoln biography, for which as early as 1861 he had begun to make notes. So perfectly did the collaborators work together and so seamlessly woven was the final product that it is impossible—by a reading of the text—to separate the threading of one from that of the other. Only one of the authors could have revealed the secret, and that neither of them ever did.

This is the story Miss Nicolay tells. In itself it is a fascinating story. Moreover, she has superior advantages as the teller. No other has had access to the Nicolay private papers, especially to Miss Nicolay's chief source, the letters which passed between her father and mother before and after their marriage. None knew her father so intimately. Finally, she was secretary to the secretaries while they were preparing for and while they were writing the biography.

It was not to be expected that Miss Nicolay, a devoted daughter, would write—as did David Donald of Herndon—a critical biography of this one of Lincoln's biographers. At that she has made no attempt. Her purpose was to draw the curtain and give her readers an intimate portrait of her father, not forgetting that often Lincoln was in the foreground. Her advantage was that her father—in his letters to her mother and to John Hay[2] and in various memoranda aptly quoted—frequently painted the picture she unveils.[3]

Of equal—perhaps to Lincoln students, of greater—interest and value is the story of the Nicolay and Hay biography here for the first time fully told. Miss Nicolay furnishes substantial evidence for that definitive appraisal of this work which remains to be made.

When Miss Nicolay essays to assess the merit of the biography she is not entirely convincing. Especially is this true of her depreciation of Robert T. Lincoln's editing: "There is no evidence to uphold a statement made, from time to time, to the effect that Robert Lincoln carefully and persistently 'edited' the Nicolay-Hay biography." This is a subject about which there has been much controversy among Lincoln students. Of Nicolay and Hay, Paul M. Angle wrote: "Their Lincoln, one feels sure, was shaped not so much by the restraining hand of Lincoln's son as by their own codes and convictions."[4] Benjamin P. Thomas pointed out that Nicolay and Hay agreed with Robert Lincoln that if he would permit them to use his father's papers, they would allow him to approve their manuscript before publication. Mr. Thomas quoted some pages of the original manuscript and gave the alterations which were made before publication. One of these was unquestionably the work of Robert Lincoln. Mr. Thomas continued:

> The hand that altered the other passages cannot be identified; but . . . it is certain that if they were not censored by Robert Lincoln, they were changed by John Hay when he read them from Robert's "point of view".[5]

Mr. Thomas added that "to a modern historian such truckling to the whims of Robert Lincoln would seem intolerable".[6]

Neither Nicolay nor Hay felt this way. They did not agree with their critics that there was in their work any taint of "aggressive Northernism", and when Richard Watson

1. Hay was classified as a clerk in the Department of the Interior and was on the payroll of that department. "I have had John Hay appointed to a clerkship in the Department of the Interior and detailed for special service here at the White House, so that he gives me the benefit of his whole time." (*Lincoln's Secretary*, 76.)

2. One copy of the correspondence between Nicolay and Hay is in the Illinois State Historical Library at Springfield.

3. Having recently read and written of Anna Ella Carroll (Cf. Armstrong, "The Story of Anna Ella Carroll: Politician, Lawyer and Secret Agent", 35 A.B.A.J. 198; March, 1949), I was interested in the mention of her in the list at the beginning of the chapter titled "Forgeries and Misquotations": "My father was . . . critical of stories about the President. One day he scribbled on a scrap of paper . . . those he deemed questionable." Included in this list is "Anna Ella Carroll". There is, however, no other reference to Miss Carroll in this chapter.

I wrote Miss Nicolay inquiring whether in her father's papers she found any mention of Miss Carroll. She replied: "I am sorry I cannot give you specific information as to my father's estimate of her claims. I do not recall ever hearing him talk about her. But the inclusion of her name in his list of 'spurious quotations' etc. indicates that at least he thought her claims excessive."

Perhaps Nicolay had in mind the letter which Miss Carroll on August 14, 1862, wrote to Lincoln, and which is among the recently released Lincoln papers in the Library of Congress. This is a letter of complaint about Lincoln's attitude toward her claim, and in it she says: "When you said to me, that my proposition was 'the most outrageous one ever made to any government upon earth', I remarked that the difference between us was in our views upon the value of intellectual labor in the administration of government."

4. Angle, *A Shelf of Lincoln Books*, 35.

5. Thomas, *Portrait for Posterity*, 112.

6. *Ibid*, at 118. The latest and best study of Robert Lincoln's influence upon the Nicolay and Hay biography is found in David C. Mearns' prefatory essay to his edition of *The Lincoln Papers*. Mr. Mearns points out that Nicolay and Hay, in using the Lincoln papers, "labored under the direction of a zealous proprietor" to whom they had given "plenary blue-pencil powers" which they were careful to see that he had little occasion to use. (I Mearns, *The Lincoln Papers*, viii, 75-76.)

Gilder[7] suggested a modification of a virulent attack on Gen. Robert E. Lee their reaction was one of pained surprise. Gilder persisted, writing Nicolay that one night at the Century Club the sculptor, St. Gaudens, had remarked of the biography, "How damn partisan it's getting!"[8]

Nicolay did seem partly aware of the hypersensitiveness of Lincoln's son, for once he wrote Robert:

> I am also specially anxious—and I press this point particularly—that not a scrap of paper of any kind be destroyed.[9]

While Nicolay and Hay completely acquiesced in Robert's ownership and control of the Lincoln papers, some others did not. When the biographers applied for permission to examine the records of the War Department the curt letter of refusal contained an assertion that has been recently repeated: "The records of the Executive Mansion are public and not the property, and *cannot* belong to private parties—even to Mr. Lincoln's heirs."[10]

That Miss Nicolay's biography of her father is not critical does not lessen its value or interest. These derive from the revealing glimpses we catch of Lincoln through the eyes of one who for more than four years lived in the White House with the war President,[11] and from Miss Nicolay's careful documentation of factual statements about her father. We accept her testimony as vivid and truthful, although her conclusions may not be ours.

WALTER P. ARMSTRONG
Memphis, Tennessee

MISSOURI LAWYER. *By John T. Barker. Philadelphia: Dorrance & Company. 1949. $3.50. Pages 391.*

Sir Thomas More, in his *Utopia*, said that in that happy land serjeants and proctors at law and all such had been excluded and banished, and that every man could plead his own cause before the judge, who could readily decide disputes because they had not been confused by the crafty handling of lawyers.

Unfortunately, we do not live in that rarefied atmosphere. In this world, with its conflicting interests and multitudinous laws, people might as well be denied justice as to be denied the right of counsel, and that right is worthless unless the counsel is competent to represent and advise them properly. This book is the story of the beginning and development of a competent counsel, and of many other interesting things, as we shall see.

In the setting in which John T. Barker grew to manhood, wealth, while important, was not dramatically important. Drama on the stage, holding up its mirror to life, was seldom seen in Carrollton, Missouri, but the actual drama of life, to be seen by all, was staged at the courthouse off and on throughout the year. It is perfectly obvious why the son of the High Constable, with his eager, inquiring and brilliant mind, should choose the field of the law as his calling and the defense of the life, liberty and property of man as the major interest of his life.

The career of Barker, the future general in the field of law, in some respects and to a certain point, parallels that of Sir Joseph Porter, K.C.B., the admiral in *H.M.S. Pinafore*. You will remember Sir Joseph's song:

> When I was a lad, I served a term
> As office boy to an attorney's firm;
> I cleaned the windows and I swept the floor,
> And I polished up the handle of the big front door.
> As office boy I made such a mark
> That they gave me the post of a junior clerk;
> I served the writs with a smile so bland,
> And I copied all the letters in a big round hand.

(In Barker's case I must here file a mild dissent, for, having received hand-written notes from him over a period of many years, which I was able to read with some effort, I doubt if his letters as a boy were "in a big round hand.")

> In serving writs I made such a name,
> That an articled clerk I soon became;
> I wore clean collars and a bran new suit,
> For the pass examination at the Institute.

Barker, I am positive, wore clean collars and a "bran new suit" whenever he could afford one, because he has always been immaculate; not an Earl Rogers in dress, but much more dressy than the average lawyer. As he has always been one of the most gracious of men I am also positive that he served the writs "with a smile so bland." Certainly he did well in his "pass examination," although it was before the local court at Carrollton; and of legal knowledge he "acquired such a grip" that I am sure the small firm who had been his preceptors would have taken him into the partnership

7. Editor of *Century Magazine*, which was running the biography serially.

8. *Lincoln's Secretary*, at 271.

9. The question of how many of his father's papers Robert Lincoln destroyed has been the subject of acrimonious controversy. He often threatened to destroy all, and probably at one time intended to do so. He unquestionably destroyed some of the private letters and withdrew, in order to make gifts to friends, some of the papers from the White House files, which were later deposited in the Library of Congress. Mr. Mearns is inclined to the view that there was no systematic "purge" of the White House papers, and "that the Lincoln papers in the Library of Congress are substantially intact". (*The Lincoln Papers*, at 121, 122, 123, 127, 129, 130, 135.)

10. Letter from W. F. Barnard to Nicolay dated December 26, 1876, and quoted in full in *Lincoln's Secretary*, at 283.

Cf. The Lincoln Papers, at 22-23: "From the time of Washington a president's papers had been considered private papers, and at the end of each administration the White House files were removed and passed to the possession of the late landlord or his heirs. William Howard Taft, who knew the tradition and had followed the practice, told the students of the University of Virginia in January, 1915: 'The office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to official files of the Department to which it may be addressed. The President takes with him all of the correspondence, original and copies, carried on during his administration. Mr. Robert T. Lincoln told me that in his father's day, great as the business must have been during the war, there was practically no correspondence except what was purely personal, carried on in the executive office by two or three clerks. Everything was referred to the different departments for disposition, with sometimes a memorandum by the President.' Precedent, in other words, was not only ample, but thoroughly understood. No one demurred at the transfer of the files; no one disputed the Lincoln family's right of ownership."

11. A letter from Nicolay to his fiancée has a modern sound: ". . . an ill-kept and dirty rickety concern it really is, from top to bottom. I wonder how much longer a great nation, such as ours is, will compel its ruler to live in such a small and dilapidated old shanty, and in such a shabby-genteel style." (*Lincoln's Secretary*, at 227.)

if he had so desired. But his start was symptomatic of his entire life. He started on his own and took on all comers.

At this point we completely leave Sir Joseph Porter, who catered to the rich and maneuvered his way into Parliament through the questionable device of the rotten borough. Barker, in his turn, took the part of the poor and the downtrodden, was elected to the legislature from Macon County, Missouri, to which he had moved and commenced the practice of law on his own, and, after a brief service in the Legislature was elected by his fellows as their Speaker. Then, still a very young man, earnest, devoted to principle, and, as always, on the side of the average man, he was elected as Attorney General of his state.

His innate sympathy with the lowly, and with the underdog whether rich or poor, is amply documented in this volume. A striking example is his defense of Aaron Burr in his speech at Houston. In the mind of the average American, Benedict Arnold and Aaron Burr were the two greatest traitors our country has ever known. No distinction is made in their crime against the nation, but the mind of a lawyer, upon his first weighing of the evidence recorded even on the pages of partisan history, discerns a clear distinction. Burr was certainly not a traitor to his country, even though he may be convicted of the crime of disloyalty to his political party and former friends. Although he was a man of many faults, Burr was not the traitor he has been pictured, and this Barker clearly demonstrates.

While *Missouri Lawyer* will have particular appeal to the thousands of lawyers who are friends of John T. Barker—and they will be found in every state and in many counties in every state of the Union—the book has a much wider appeal. To every boy, young or old, it is the Horatio Alger story of the poor boy, who, without the aid of college education, made his way on merit to the top of his profession.

The book is more than an autobiography of an interesting lawyer. It begins with the background of pioneers traveling to what we now call the Middle West, but to what was then the extreme border of the civilized country. It moves on to the story of border warfare between Missouri and Kansas, and then to Civil War personalities many of whom Barker later knew in person. Jesse James, driven to outlawry by bitter times and narrow men, has become a legend. His story, and that of his family, sympathetically but without apology, is fitted into the pioneer picture.

"Whodunit" fans will find here several murder stories and some unsolved mysteries told interestingly by Barker, who defended several of the accused.

Trust-busting and rate litigation, which highlighted an era in law and politics, are briefly but sufficiently told by Barker, who was a major participant. The Pendergast era in Kansas City, vice and crime, the third degree, judicial tyranny and virtue, the emergence of Truman, the Supreme Court fight, and even the famous turkey case, add interest and illustrate the many contacts a busy lawyer has in his career.

The trial lawyer, as orator, politician, and occasional office holder, has been a major factor in the civilization of the English-speaking world for hundreds of years. Just why, some people have never been able to understand. One who reads *Missouri Lawyer* will be able to visualize a champion of liberty and defender of the lowly who carries on the tradition of his predecessors.

DAVID A. SIMMONS

Houston, Texas

THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION, 1863-1914. A HISTORICAL SURVEY. *By Doris Appel Graber. New York: Columbia University Press. 1949. $4.00. Pages 343.*

An account of what was written between 1863 and 1914 on the law governing the occupation of enemy territory during actual hostilities.

THE AUTOBIOGRAPHY OF SOL BLOOM. *By Sol Bloom. New York: G. P. Putnam's Sons. 1948. $3.50. Pages 331.*

In a narrative as fascinating as it is candid, Sol Bloom has related the story of his own varied, colorful and eventful life.

Dividing the story into three parts, the author recounts his experiences in San Francisco in the first division, reminisces of his days in Chicago and New York in the second part, and describes his life on Capitol Hill in the final section. In the text he has, however, emphasized his economic achievements so that the main divisions of the book could have been more accurately captioned: earning no money; a negligible amount; considerable more; a great deal; and tired of money. Needless to state, the last period represents his sojourn in Washington.

He had a "golden touch" that even King Midas would have envied, for the author relates that his annual earnings of $15,000 to $20,000 at the age of 17 were increased to $25,000 by the time he was 19. Upon reaching his majority he was employed at a salary of $1,000 a week, an amount he notes, greater than that received by the President of the United States. To illustrate his pecuniary success, when he was only 18 years of age, the author promoted a tour of the Mexican Typical Orchestra in this country, at a profit to himself of $40,000.

Horatio Alger would have disapproved of Mr. Bloom despite the latter's meteoric rise in the business world, for the narrator confesses that as check room clerk at the opera he ate garlic to discourage customers from waiting for their change. He admits selling painted window screens as medicated screens, and he observes a relationship between the meetings he arranged between blind Chris Buckley, the political boss of San Francisco, and businessmen, and the author's subsequent opportunity to purchase goods at a bargain from those same businessmen.

Sol Bloom became interested in

politics, he advises, because politicians could be of assistance to him in a business way, and he became a Democrat, because as he describes it, "The Democrats were the ones who, in return for my support, could help me most". He was approaching middle age, before he "sought a philosophical justification for the side" on which he found himself.

Throughout our chronicler's long life he maintained an active interest in the theater. His account of the industry in the period from 1850 until the early part of the present century, provides a wealth of material for historians of the Thespian art. A casual glance at the index will bear out this observation.

In 1891 Bloom went to Chicago to manage the Midway at the World Columbian Exposition. The turn of the century found him in the music publishing business, the growth of which required him to transfer his headquarters to New York. Subsequently he became a builder, and it was in 1923 that he was drafted into public life, to fill an unexpired term in Congress. The remainder of the story is a part of history. His service in public life fulfilled a longing that making money had failed to do.

The light-heartedness of the first two-thirds of the book is matched by the seriousness in the final part. As Chairman of the House Committee on Foreign Affairs immediately prior to, and during the last war, Sol Bloom was in close contact with all the Government's policy making officials. He notes that Franklin Roosevelt was the only man in the middle and late thirties that foresaw war between England and Germany, and who believed that the United States would be forced to enter the war. He describes the process of conditioning the American people to the possibility of war as "heroic treatment" administered by the late President.

Congressman Bloom represented the Government in a number of important foreign conferences, including the historic meeting in San Francisco in 1945. He discusses the issues involved in those conferences with keen insight, and he gives us an on the spot description of the various aspects of such meetings, including the trials and tribulations of the individual delegates.

The book ends with the author, then in his seventy-eighth year looking not backward but forward to a period of prosperity, clouded only by the possibility that man will be unable to control the materials that science has provided. He poses the question, "Can man discipline himself to direct the fateful wonders of his hands to the service of all mankind?"

In March of this year Sol Bloom still active, passed away. Lawyers will find this frank evaluation of his own life to be extremely interesting. The older members of the Bar will delight in the fond memories of yesterday, while the younger members will better understand the reasons that make those memories so fond.

DONALD KEPNER
University of Louisville School of Law

LAW AND THE MODERN MIND. *By Jerome Frank. New York: Coward-McCann, Inc. 1949. $5.00. Pages xxxi, 368.*

An exhaustive review of this famous book would be superfluous. By now it ranks with Holmes' *The Common Law*, Cardozo's *The Nature of the Judicial Process* and Thurman Arnold's *Symbols of Government* in its influence on American legal thought. Certainly anyone who has compared the decisions of the United States Supreme Court handed down since 1937 with the majority decisions of the same Court prior to the advent of the New Deal will realize that the present members of the Court subscribe to Judge Frank's thesis that certainty in the law is unachievable and undesirable. Whether they got that thesis from Judge Frank is dubious, but the fact that they and many lower-court judges have accepted it renders moot much of the argument that this book evoked when it was first published in 1930. If many lawyers and judges yet cling to a Blackstonian thirst for a clear and certain system of law, their number is diminishing: Our law schools, for better or worse, have sided with Judge Frank, and are teaching the next generation of lawyers that the attorney's task is to solve his clients' problems, not to search for an El Dorado of eternal justice where he will find the proper rule to apply to ascertainable facts, which will always yield a precise statement of his clients' rights and duties.

This is not a revision of the book. The publisher notes that Judge Frank decided to make a revision when the book went out of print in 1943, but that on looking through it, he found that "while he might change some of the wording he used in 1930, he would not change a single thought". Accordingly, with minor changes and a new preface, this sixth printing is the same as the original edition.

The new preface is somewhat repentant. Judge Frank seems to realize that much he said in 1930 was deliberately iconoclastic, more calculated to stir up controversy than to clarify. One who agrees with him wishes that he had chosen a more legalistic, less superficial, idiom to expound his argument; one who disagrees finds much to which he can fairly take exception. Perhaps this is unfair, for Judge Frank was writing for laymen as well as lawyers, but there is so much for the lawyer in this book that it is unfortunate that much of it will blind him to its value by arousing his animosity. It is not the lawyer who is wrong here: Part of Judge Frank's thesis is that lawyers themselves are victims of "legal mythology". In his zeal to expose that myth, he often seems to deny the truth upon which it is based. In saying that the result of a given case is uncertain and unpredictable until it is decided by a court, because it is impossible to predict what evidence the trier of fact will believe, he often implies that our legal system renders uncertain justice. This of course, is true, but only if it means that *some* cases will be decided unjustly, since they are decided by fallible human beings—as Judge Frank points out on page xxv of his preface.

Judge Frank is arguing for a re-

form of our trial methods. Few will disagree that this is long overdue. The American Law Institute threw up its hands when it attempted to "restate" the law of evidence, and instead submitted a model code, as yet not adopted in any jurisdiction. If that were all he had to say, Judge Frank would have wasted his time. But what aroused many lawyers was his insistence that the *law*—an ambiguous term which he now regrets—is uncertain and cannot be made certain, indeed that certainty is undesirable. Some read this as a denunciation of the natural law—a reading Judge Frank expressly repudiates on page xvii of the new preface—others accused him of attempting to reduce the law to a science, denounced him as a mere semanticist, decried him as a cynic who "sneered at legal rules". It must be admitted that some of this criticism is justifiable: His long analysis in terms of Freudian psychology, despite his insistence in the new preface that it was avowedly a partial explanation only, occupies too much of the book. If it was partial, the implication was that it was the largest portion. If this is not what he intended, he should have made himself crystal clear.

Yet the argument that the law should be uncertain is perhaps the most valuable part of his exposition today. The hunger for certainty, for security, which seems on the increase in our society, bids fair to upset our whole system. If the individual, of whom most of us profess to think highly, is to have security, he must sacrifice his freedom, as Hayek pointed out in *The Road to Serfdom*. The lure of socialism and communism is their promise of security. Judge Frank points out that the concept of legal certainty—understood as unchanging rules setting forth rights and duties which can be ascertained and applied so as to yield a precise determination of the result of any legal problem—is as illusory as the concept of economic security: Both are unachievable, but the search for the former may lead, if we fall victim to its charm, to as totalitarian a philosophy as the latter.

This has nothing to do with the moral concept of Justice. Justice is immutable, at least for one who accepts, as Judge Frank says he does, the natural law as taught by Aristotle and St. Thomas Aquinas. But the rules change that should be applied by courts to achieve that Justice. The fellow-servant doctrine may have been an excellent rule in the middle of the nineteenth century when industries were small, and the number of jobs available in the country was constantly increasing so that the worker was in a position to contract freely with his employer. It may not be so excellent a rule today when conditions of employment have changed so greatly. Rules of the law of property which conformed to moral justice in the thirteenth century would often yield quite unjust results were they applied today. To search for certainty in legal rules is to confuse those rules with Justice itself.

This is not to say that the appearance of legal certainty is undesirable. Judge Frank uses many pages to explain why men desire certainty in law—and confesses that his is only a partial explanation. In our legal system, the craving for certainty is satisfied by the use of legal fiction—by what Judge Frank calls the "basic myth". If lawyers are to do their work well, they should understand the myth, which does not mean that it should be abolished. It is a useful tool for securing a satisfactory, that is, a just, solution to the important problems lawyers are called upon to solve. If they do not understand the tool, they cannot use it well, and Judge Frank's book points the way to a better employment of that tool. Lawyers can well afford to reread this work—it is a good antidote for the self-satisfaction and self-righteousness into which members of an intellectual profession cannot avoid occasionally slipping.

R. L. Y.

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ *The Journal and the Public*

Last month we discussed the relationship between the JOURNAL and the members of the Association. Now we wish to discuss the relation of the JOURNAL to the public. Our JOURNAL of course has a greater responsibility to the public than has a trade paper, because our Association is more truly professional, that is, its own affairs are subordinate to its concern for the public welfare, and its chief interests are the law and the administration of justice, which are a vital concern of the people.

Since ours is a government, not of men, but of laws, it follows necessarily that ministers of the law are also ministers of government. Our lives and our service are impressed with a public trust. We have solemnly acknowledged it in our oaths of office.

Since the JOURNAL is the magazine of the Association, it must voice the ideals and the considered judgment of the profession. Our Association should develop and the JOURNAL should publish the best opinion of the legal profession on all public issues within the objectives of our Association. There is a wealth of talent and experience to draw from. Its best conclusions should be presented on a plane and in terms which are available to all literate citizens. There is an urgent need for sound counsel, and our Association can do much to meet it, if our members will work to that end.

> It was largely through the Inns of Court that the spirit of the legal profession was impressed upon the governing class of England and the general literature of English-speaking people. It was due to the breadth and comprehensiveness of the professional influence that English law was so effective in molding social and political development.

That professional influence has also been strong in America. Now is no time to allow it to wane.

The JOURNAL does not minimize the difficulty of its task. In spite of its gratifying accomplishments in recent years, much remains to be done to extend the professional influence into a wider and deeper public consciousness. The JOURNAL will have to convince the reading public that it is something more than a house organ or trade paper. It will have to make its message attractive. But the JOURNAL believes that the profession has something to say which the nation needs to hear. If the members of the Association and the editors of the JOURNAL will unite in preparing and presenting the professional message in pleasing form and with convincing force, soon the editors of the daily papers, the columnists and informed readers generally will feel that they cannot afford to miss or ignore what the AMERICAN BAR ASSOCIATION JOURNAL has to say.

■ *Human Rights and the Declaration*

To discuss any subject intelligently requires common understanding of basic facts. Argument becomes clear only as those who listen are acquainted with its factual foundation. And argument is more difficult when as a preface it is necessary to present a mass of factual details to pave the way to understanding. These points should be kept in mind by those who speak of the pros and cons of the Declaration of Human Rights, a Covenant on Human Rights, or a Genocide Pact. There is such a lot to be known before we attempt agreement or disagreement. We have to go far back into history, and also to be aware of actual present day conditions.

Individuals are indeed individuals. There are few identical twins either in appearance or in thought or in action. Each perforce is on his own; each really likes to think of himself as an individual—as free. Freedom is the very essence of our being. The rights which are asserted in the Declaration are intended to express the rights of each and every human being. That is what the framers of the Declaration thought they were considering. It is not a declaration of the rights of a state.

Those who challenged the Declaration before it was adopted on December 10, 1948, were asking for further consideration before adoption, calling attention to probable legal and social and economic conflicts with our own system of government. Their words of caution ought to be weighed before any part of the Declaration ripens into a covenant which is to become basic law. If we can be certain that all the whereases and articles mean the same thing in all translations to all people, this nonbinding Declaration may fulfill a lofty purpose. However, we may express a doubt if there is any such certainty. In its social and economic aspects some may be led to think that it is a pledge by the United States to share its prosperity with all the world. We may well doubt if there was any such intent on the part of those who signed on the dotted line representing this country.

In this connection and in avoidance of such argument, it is unfortunate that nothing is said in definition of duty. The only reference to duty is in general terms and then only with respect to the development of the individual personality. Such an extensive declaration of rights, even though not in fact fully inclusive of all conceivable rights, becomes misleading in the absence of some statement of the correlative obligations incident to the rights themselves. Every right involves some duty —to oneself or to others. No right of any man can be asserted as absolute—yet this Declaration appears so to assert. It was assumed that men had rights when Moses proclaimed the Ten Commandments. In every land something in the nature of such commandments qualifies rights. What we know as our own Bill of Rights is not so much an assertion of rights as a restriction upon government action. Both the Commandments and our Constitution presuppose the rights of man as an individual superior to any right of the Government which derives its powers from the individuals who compose its citizenry. We deny the supremacy of the State, and we find disagreement in prospect as to future covenants because we do not recognize that the rights as asserted are derived from the State and depend on the State for fulfillment. This in turn involves an aspect of duties undefined, because although the unit man has rights, his exercise of those rights must depend on environment and respect for similar rights in others which involve community, state and perhaps international control. Yet we do not concede that the rights flow from the state downward.

This is not written to condemn the well-intentioned efforts of those who undertook to frame the Declaration. We criticize more the failure to consider the political aspects of what they were doing. We use the word "political" in its broadest sense. If the individuals have rights, they must be entitled to know what is being done to them before those rights are crystallized. Ours is a country of rights. We take them as a matter of course. Rights are basic in our thinking. But the peoples in other countries have not been brought up that way. Many of these other peoples would be surprised to learn they each had even such rights as are implied under the American Constitution. What then must be their surprise to be told that they have all the so-called rights now set forth in this Declaration—and that golden America is pledged to secure them. It is like announcing to all peoples that the world owes a living to each. How else is this amazing detail of rights to be received in other countries? And what will these other peoples be encouraged to think of us if shortly it is found that the Declaration or Covenant is empty on fulfillment?

It is submitted that enough harm has already been done by our participation in the Declaration. We certainly should not join in a Covenant as to any of these rights—even as to those we now have at home—unless we state specifically that we do not assume responsibility to the peoples of any other country to see to it

that their own governments give them protection. Anything else will lead to international dissension.

In connection with the foregoing, it is interesting to note that an article by General Bradley in *Collier's* for February 26, 1949, states that a professor of psychology told him that the post-war soldier is "undisciplined, jealously aware of his rights but not of his responsibilities—mercenary, and antagonistic to authority in any form". It is respectfully submitted that this is what may happen if we do not emphasize the responsibilities that are inherent in rights. There seems to be a danger that the Declaration may mislead the peoples of other nations into a misunderstanding of what America is undertaking.

LOUIS E. WYMAN

Manchester, New Hampshire

■ *The End of a Divorce Racket*

That a well-organized, intelligent and fearless inquiry by a local bar association into a juridical sore spot may change the course of events locally is an attested fact. When it affects events in another state, it would appear worthy of note.

Back in 1946, when divorces were at their all-time high, the Chattanooga Bar Association, under the leadership of Clarence Kolwyck, became acutely aware there was something rotten in the State of Tennessee. A zealous investigation resulted in what the Chattanooga *Times* called "a monumental report, blasting this community's disgraceful divorce racket, analyzing every phase of the evil".

As a result, the local situation has been pretty well cleaned up, and the Chattanooga Bar Association won the American Bar Association Award of Merit in 1947.

Among other things, the report showed that in Hamilton County (Chattanooga) there were five divorces to every marriage, as against a national average (at that time) of one divorce to every three marriages. Thus, mathematically speaking, the local situation appeared fifteen times as bad as elsewhere.

The report concluded that there was something rotten in the State of Georgia too. The lax marriage laws of the neighboring state were blamed. It was pointed out that Tennessee couples by the thousand ran off to the Gretna Green in northern Georgia to marry in haste only to return to Tennessee and repent—not always at leisure.

Be it said to the credit of the Georgia legislature, the criticisms implicit and explicit in the Chattanooga Bar's report have been heeded. On February 19, it concluded the longest fight in its history for the passage of a bill. It enacted the requirement (now law in over three-fourths of our states) that marriage license applicants must submit to serological test to evidence their freedom from syphilis. Issuing license without such test is made a misdemeanor.

Tennesseeans are confident that this requirement, together with a five-day waiting period (enacted in 1946, but providing no penalty for abuse), will relieve some of the pressure on their divorce courts, especially those nearer the Georgia border.

More orchids to the Chattanooga Bar Association!

PAUL W. ALEXANDER

Toledo, Ohio

■ *Civil Rights: Rôle of the Supreme Court*

W. D. Workman's article in this issue titled "State Regulation of the Right to Vote: The Rôle of the Supreme Court in Civil Rights", calls sharp attention to the extent to which the present Supreme Court has gone in banning racial discrimination in the electoral process. The Fourteenth and Fifteenth Amendments are directed only at the nation and at the states. They—not, individuals, associations or corporations—are forbidden to discriminate. It had been held, until the present Court decided otherwise in an overruling opinion from which Mr. Justice Owen Roberts vigorously dissented, that state action meant action by some official state instrumentality and not by a voluntary association such as a political party.

Judge Waring's decision, which the Supreme Court refused to review, is significant not only in opening party doors to all regardless of race but as indicating the trend of the times in defining the state action forbidden by the Fourteenth and Fifteenth Amendments.

The restrictive covenant cases illuminate another facet of this trend. Such covenants are not held illegal since they are agreements between individuals; they are, however, emasculated by forbidding federal and state courts to enforce them on the ground that court recognition would be state action.

The argument against the constitutionality of a federal anti-lynching law is that the action of a mob is not that of a state, but of the individuals composing the mob, and therefore, a state and not a federal crime. The reply is that when a state fails effectively to prevent lynchings its inaction is equivalent to action. Even the present Court has not indicated how it will be impressed by this novel argument.

The final step which would give the Federal Government complete control of racial discrimination would be to hold that Congress can by statute prohibit segregation in inns and places of amusement within the states. The civil rights cases, decided shortly after the War Between the States by a Court composed entirely of Republicans, held such a statute unconstitutional as not involving state action. In these cases, however, the question was not presented as to whether an innkeeper or purveyor of amusement was entitled to invoke court aid in enforcing or defending his personal policy of segregation.

In the event there is enacted a federal anti-lynching act and eventually a federal non-segregation statute the Court will speedily be presented with these questions. The answers may have much to do with the solution of one of our most difficult and dangerous domestic problems.

Editor to Readers

Our attention has been called to an omission on page 248 of the March, 1949, JOURNAL, at the fourth line from the bottom of the second column. After the word "commerce" there should have appeared the limiting words: "in its primary meaning", so that the sentence would read: "Where Sections or Committees give consideration to matters relating to *commerce in its primary meaning*, they should refer to the Standing Committee on Commerce, which has primary responsibility for Association policy in that field."

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Lawyers who read Judge Robert N. Wilkin's article "Natural Law: Its Robust Revival Defies the Positivists", which appeared in our March issue (35 *A.B.A.J.* 192), may want to obtain the full text of the original address before the Second Natural Law Institute held at the University of Notre Dame in December, from which the article was taken. The full text of the address will soon be available in pamphlet form, reprinted from the *Notre Dame Lawyer*. Inquiries should be addressed to the *Notre Dame Lawyer*, Box 185, Notre Dame, Indiana. The price of the book is $2.00.

THE PRESIDENT'S PAGE

FRANK E. HOLMAN

■ For a number of years much attention has been given by our Association to the standardization of law schools and the improvement of legal education. During recent years, chiefly through the Section of Legal Education and Admissions to the Bar, a constructive program has been developed with respect to post-legal education, but little definite consideration has been given to the character and content of prelegal education.

The question of what a standard law school curriculum should be has become somewhat more difficult during the last generation because the scope of law study and the practice of the law have been greatly enlarged. Prior to World War I there was no need for a law school to include in its curriculum courses in taxation, administrative law, labor law, or certain other fields of law that have now become of the highest importance to the practitioner. In addition to the necessity of including additional courses along the foregoing lines, a considerable school of thought has developed to the effect that social science courses should also be included in the standard three-year law school training. The result is that less and less attention, and in some instances no attention at all, has been given to the adequate study of American constitutional history and the American constitutional system of government. At the same time that this trend has been going on in the law schools, the study of American constitutional history has been more or less crowded out of our schools, colleges and universities by the expansion of courses in the social sciences. As a consequence, many students entering law schools during the last twenty years or more, although A.B. graduates of colleges and universities, have not only had no adequate work in English or American history as history, but they have also had practically no training in English except on the composition side; that is, little or no work in English or American literature as such. Thus, many prelegal students for nearly a generation have missed the intellectual discipline that comes from work in history and literature.

The fact is that even in our public high schools throughout the country the teaching of American history has been so far neglected that it has become necessary in various states to enact legislation to compel school authorities to teach American history in the public schools. Last year such a law was passed in the State of Missouri, and I was recently authoritatively advised that great difficulty was being experienced in that state in securing teachers who knew enough about American history to teach it competently. Similar bills requiring the teaching of American history in public schools were recently introduced in the state legislatures of Illinois and New York.

It is surely a tragic commentary on our public school authorities and

their administration that it requires an act by the state legislature to compel the teaching of American history. Instead of learning history and acquiring knowledge and appreciation of our American system of government, the oncoming generation is being taught the philosophy of collectivism under the noble title of "Social Justice", with the result that the students in some of our great universities have been so far indoctrinated that they cease to take any pride in the great men and the great events that produced the American system of constitutional and representative government.

In a recent debate at the University of Wisconsin, a student debating team from Cambridge University, England, won a debate before a faculty and student audience by a vote of more than two to one by supporting the thesis "that the world would be happier had not the American Revolutionaries left the British Empire". These English students won the debate largely by ridiculing the American patriots of 1776 and by such assertions as the following:

1. That Columbus went too far in discovering America.
2. That instead of the Pilgrims landing on Plymouth Rock, Plymouth Rock should have landed on the Pilgrims.
3. That it would have been better if America had never been born.

Apart from anything that might be said with respect to America's contribution to the happiness of the world, there can be no doubt that it was the American revolutionaries who taught the British the necessity of dealing with their other colonial areas upon a basis of according local self-government and dominion status which for many years contributed to the happiness and peace of the world, at least among English-speaking peoples. Moreover, America as a colony of Britain could never have attained the position of influence and strength which enabled it to become the determining factor in two world wars fought to preserve some measure of dignity and independence for the people of the world, and which now enables it to save the shattered economies of England and the rest of Europe.

The medical profession has given much more attention to the character and content of premedical education than our profession has given to prelegal education. Admission to a recognized medical school is dependent upon the applicant's having had a very definite premedical course. Although perhaps the same certainty and uniformity could not be achieved and ought not to be attempted with respect to prelegal education, it would seem that something ought to be done by our profession, through our Association, to avoid the present situation where students entering law schools have little or no historical knowledge or personal appreciation of the basic events and concepts which resulted in the foundation of the republic and little or no knowledge of what our forebears intended in establishing a constitutional and representative commonwealth.

For a number of years in examining applicants for positions in my office and to some extent at the request of other law offices, I have often found that if a law school graduate had received any advice at all as to his prelegal training, he had nearly always been advised to pursue courses in the social sciences to the exclusion of courses in English and American history and in literature and in the languages. Certainly some attention should be given by our profession and our Association to a correction of this trend in prelegal education and although, as above indicated, no attempt should be made to establish such a definiteness in prelegal training as has been established in connection with premedical training, at least some minimum requirements should be set up with respect to training in English and American history and English and American literature.

I feel confident that if Jefferson were living in our day he would see what we see; that the individual is caught in a great confused nexus of all sorts of complicated circumstances and that to let him alone is to leave him helpless as against the obstacles with which he has to contend; that therefore law in our day, must come to the assistance of the individual. It must come to his assistance to see that he gets fair play; that is all, but that is much.

—Woodrow Wilson, *The New Freedom*.

Association Constitution and By-Laws:

A Summary of Proposed Changes

by Roy E. Willy • Chairman of the Committee on Rules and Calendar

■ In the July, 1948, issue of the JOURNAL appeared proposed amendments to the Constitution and By-Laws of the American Bar Association as well as a proposed amendment to the Rules of Procedure of the House of Delegates. These amendments were presented for the consideration of the General Assembly and the House of Delegates at the 1948 Annual Meeting at Seattle and represented the result of years of study by members of various committees interested in the administrative procedure of the American Bar Association.

The amendments were not acted upon by either the House of Delegates or the General Assembly at the Seattle meeting. The House of Delegates adopted a resolution referring the amendments back to the Committees on Rules and Calendar and Scope and Correlation for their joint consideration, with instructions to report at the Mid-Winter Meeting of the House of Delegates In this action the General Assembly concurred. Thereafter these two committees held a joint meeting in Chicago and their further study was embodied in the report which was made to the House of Delegates at its Mid-Winter Meeting. The amendments as reported were approved by the House with only minor changes in the recommendations made by the Committee on Scope and Correlation and the Committee on Rules and Calendar. These amendments, as now approved by the House of Delegates, will be presented to the General Assembly for final action at its meeting in St. Louis next September. In view of the fact that these amendments have already been published in full in the JOURNAL, and likewise appeared in the Advance Program of the Seattle meeting, their further publication in the JOURNAL is not now deemed necessary. They will, however, be found in full in the Advance Program of the St. Louis meeting. As a matter of general information to members of the American Bar Association, a brief summary of the amendments, as approved by the House of Delegates, follows:

The first amendment approved was to Article I and relates to the name and object of the Association. This amendment broadens the scope under which the Association can operate in the future by including, in addition to the material found in the present Constitution, the obligation to uphold and defend the Constitution of the United States and maintain our form of representative government as found in the Constitution, with the added injunction to apply its knowledge and experience in the field of law to the promotion of the public good.

An amendment adopted to Section 3 of Article II of the Constitution, relating to the expulsion and reinstatement of members, provides in addition to the existing grounds for suspension or expulsion an automatic suspension from membership of any member who has been disbarred by any tribunal of competent jurisdiction, a provision heretofore lacking in our Constitution.

An amendment adopted to a portion of Section 5 of Article VI relates solely to the filling of vacancies in the House of Delegates. The new amendment provides that in the event of a vacancy occurring in the office of a State Delegate, where such vacancy is for an unexpired term of one year or less, the selection then made shall be final and that there shall be no election to fill such unexpired term unless the vacancy to be filled shall be for a period longer than one year.

An amendment adopted to Section 1 of Article VII of the Constitution relates to vacancies occurring on the Board of Governors. The present provision of the Constitution on this subject provides for the filling of such vacancy on a temporary basis only until the next election. Under the amendment the vacancy when filled will be filled for the balance of the term.

An amendment adopted to Article X, relating to Sections, consists of a regrouping of the Sections in alphabetical order and the elimination from the Constitution of much of

the material relating to the organization and operation of Sections which is now placed in the By-Laws.

Articles XI, XII and XIII of the Constitution have been renumbered as Articles XII, XIII and XIV, and a new Article XI inserted relating to committees. The amendments to the By-Laws which follow were approved by the House of Delegates and will also be presented to the General Assembly for final action in September.

Article IV, relating to Reports and Publications, as now amended covers the AMERICAN BAR ASSOCIATION JOURNAL and other official publications of the Association. The amendment also provides that the Treasurer of the Association shall be a member of the Board of Editors of the JOURNAL.

Article IX of the By-Laws, which in the present By-Laws relates to the AMERICAN BAR ASSOCIATION JOURNAL, has been entirely changed so that it now relates to the Sections of the Association, their establishment, organization and control. All material relating to Sections, except the authority found in the Constitution for their creation, is now contained in this Article of the By-Laws.

Article X of the By-Laws, relating to committees, has been largely rewritten; the standing committees have been reclassified, and a number of special committees have now been given the status of standing committees. All the material relating to committees, their organization and scope is found in Article X.

The present Article XI of the By-Laws has been renumbered Article XII and the old Article XI now covers the reports of sections and committees.

Most of the material in the present Article XII of the By-Laws is now found in Articles IX, X and XI and a new Article XIII codifies all the existing By-Laws with reference to appropriations and expenses of the Association.

In addition to the foregoing a minor amendment was adopted to Section 4 of Rule I of the Rules of Procedure of the House of Delegates, relating to the transmission by the Secretary of reports of sections and committees to members of the House prior to the Annual Meeting.

These amendments, all of which now bear the approval of the House of Delegates, will—as stated above—again be published in full in the Advance Program for the September meeting in St. Louis. At that time they will come before the General Assembly for final action.

Plans of the Committee on Ways and Means: A New Headquarters Building by 1953

■ A new Headquarters building has become a primary need of the American Bar Association. The present Headquarters is completely inadequate for the expanding activities of the Association, and action in the near future is imperative. The Board of Governors, recognizing the necessity for immediate action and looking to the accomplishment of this purpose, adopted the following resolution, which was approved by the House of Delegates:

> RESOLVED, That the Ways and Means Committee of the Association be directed to give consideration and study, and to make recommendations, with respect to the construction of an adequate Headquarters building for the American Bar Association; that such authority shall extend to the investigation of the facilities required for the activities of the Association, the tentative planning of such building, its location and probable cost, together with the plans for raising the money necessary for the financing of such project.

At the Mid-Winter Meeting of the House of Delegates a report by W. E. Stanley, Chairman of the Ways and Means Committee, indicated that considerable work had already been done in studying the requirements of a building that would meet the needs of the Association in the years ahead, as well as have a character and dignity that would reflect the importance of this Association and the profession in the affairs of this country.

A preliminary survey has indicated that the cost of such a building and the property on which it would be located would be approximately one million dollars. It is the present purpose of the Committee to embark upon construction only when the money is completely available. The Committee does believe, however, that with the help of the entire membership with respect to an undertaking that should be so near to the heart of every American lawyer the necessary money can be made available in time to permit the laying of the cornerstone in August of 1953 at the time of the Seventy-fifth Anniversary of the founding of the Association in 1878.

Although the plans of the Committee will be presented to the Annual Meeting in St. Louis, it was felt that some immediate action should be taken to make a start upon the financing prior to that time. Accordingly, at the Mid-Winter Meeting in Chicago, action by the Board of Governors was approved by the House of Delegates which required the Treasurer of the Association to add to the regular dues notice of $12.00 sent to every member an additional charge of $5.00 which should be clearly indicated as voluntary. This does not mean that the dues have been increased. It merely means that when each member receives his notice of dues there will be brought to his attention the opportunity if he so desires of contributing this addi-

(Continued on page 442)

Review of Recent Supreme Court Decisions

BANKRUPTCY

Section 77 Reorganization—Whether, Where Plan Gives Lessor Corporation Option To Sell Property to Corporation in Reorganization or Suffer Disaffirmance of Lease, Lessor's Minority Stockholders Can Enjoin Sale of Assets Is Matter of State Law To Be Decided by State Courts and Not Bankruptcy Court

■ *Callaway* v. *Benton*, 336 U. S. 132, 93 L. ed. Adv. Ops. 443, 69 S. Ct. 435, 17 U. S. Law Week 4189. (No. 21, decided February 7, 1949.)

The South Western Railroad, a Georgia corporation, had leased its entire line to the Central of Georgia Railway since 1869. In 1940, the Central of Georgia entered reorganization under Section 77 of the Bankruptcy Act. The plan of reorganization promulgated by the Interstate Commerce Commission and approved by the District Court gave South Western the alternative of selling its line to the Central of Georgia in exchange for bonds of the reorganized company, or of having the lease terminated and the property returned to it. A majority of South Western's stockholders voted in favor of sale to the lessee. Members of the minority brought suit in the state court to enjoin the sale on the ground that, under Georgia law, the entire assets of the company could not be sold without unanimous consent of the stockholders. The state court granted a temporary injunction. The bankruptcy court enjoined further prosecution of the state court suit, and declared the temporary injunction null and void. The Court of Appeals reversed.

The CHIEF JUSTICE, speaking for seven members of the Court, affirmed the action of the Court of Appeals. The plan indicated, he noted, that the ordinary rules of offer and acceptance were intended to apply, and therefore the amount offered to it for sale of its property was a question of "business judgment". There is no reason, he said, why the ordinary incidents of a sale of assets should not apply.

Although South Western is a creditor within the meaning of Section 77 (b), he remarked, its individual stockholders are not, and hence neither the two-thirds vote provision nor the "cram-down" provision of Section 77 (e) applies to them. "The plan of reorganization in effect hands South Western a contract of sale", he went on. "Whether or not South Western signs the contract must depend not only upon its business judgment, but also upon the charter of the company and the laws of the state of its incorporation". He was careful to point out that nothing in the opinion was intended to derogate from the power of the ICC to override state law interposing obstacles in the path of otherwise lawful plans of reorganization, nor to lessen the ambit of federal power in reorganization proceedings.

Mr. Justice DOUGLAS, joined by Mr. Justice RUTLEDGE, dissented on the ground that the Bankruptcy Act gives federal agencies exclusive command over the reorganization process, and that the bankruptcy court here had jurisdiction to determine what the Georgia law was on this point. "If state courts can intrude with injunctions on such state law questions", he remarked, "the exclusive command of the federal agencies over the reorganization proceedings is lost, its efficiency is undermined, and minorities are given leverages which the scheme of Section 77 explicitly denies". Y.

The case was argued by T. M. Cunningham for the petitioner, and by Charles J. Bloch for respondents.

CONTEMPT

Due Process—Conviction and Punishment for Contempt Committed in Open Court Upheld as According Due Process of Law

■ *Fisher* v. *Pace*, 336 U. S. 155, 93 L. ed. Adv. Ops. 435, 69 S. Ct. 425, 17 U. S. Law Week 4185. (No. 45, decided February 7, 1949.)

Fisher, a lawyer, was committed for contempt by the Texas trial judge before whom he was trying a workman's compensation case. The contempt adjudication was made after he had twice been warned by the judge (as held by the majority) not to attempt to explain to the jury to which special issues had been submitted the limitation upon the amount of his client's recovery. The state supreme court refused to grant a writ of *habeas corpus* to effect his release from the commitment. On *certiorari* to the Supreme Court, Fisher alleged denial of due process of law in violation of the Fourteenth Amendment.

The judgment of the state court was affirmed in a majority opinion by Mr. Justice REED, who said that there must be adequate facts to support a contempt order, but that the record cannot depict such "elements of misbehavior as expression, manner of speaking, bearing, and attitude" which might be contemptuous. He concludes that "mildly provocative language from the bench" does not put a wall of constitutional protection about an attorney so as to permit him to ignore the court's rulings as Fisher did here.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurred, wrote a dissenting opinion saying that he thought the record showed an attempt by Fisher to comply with the court's ruling rather than an attempt to evade it. He said that the record could be read as meaning that the only specific matters which the judge had ruled to be irrelevant had been

Reviews in this issue by Harold F. Watson and Rowland L. Young.

"dollars and cents" and the "average weekly compensation", and that petitioner made no new attempt to get either of them before the jury. He was held in contempt, he said, for pressing a point before the jury which, according to one member of the Texas Supreme Court, he had a right to present, and not for the "tone of his voice or for his facial expression".

Mr. Justice MURPHY also dissented, remarking that there was no indication that the alleged contempt had substantially interfered with the trial, and that "this record of petty disagreement does not approach that serious interference with the judicial process which justifies use of the contempt weapon".

Mr. Justice RUTLEDGE asserts in his dissenting opinion that the trial judge acted in the heat of temper. "Whatever the provocation, there can be no due process in trial in the absence of calm judgment and action, untinged with anger, from the bench", he concludes. Y.

The case was argued by R. Dean Moorhead for Fisher, and by Quentin Keith for Pace.

Violation of Decree Requiring Compliance with Statute in General Terms Constitutes Contempt — Civil Contempt Need Not Have Been Willful

■ *McComb* v. *Jacksonville Paper Company*, 336 U. S. 187, 93 L. ed. Adv. Ops. 457, 69 S.Ct. 497, 17 U. S. Law Week 4200. (No. 110, decided February 14, 1949.)

This case involved contempt proceedings instituted by McComb, the Administrator of the Wages and Hours Division of the Department of Labor. In 1943, an injunction had been entered against the company forbidding it to violate certain specific provisions of the Fair Labor Standards Act, and ordering general compliance with the act. The District Court held that a civil contempt required willful violation of the decree, and found that no specific term of its previous injunction had been violated. It further held that it had no power to enforce compliance with its former decree by ordering the company, in order to purge itself of contempt, to pay unpaid statutory wages. It accordingly entered an order broadening the scope of its previous injunction rather than issuing a contempt order. The Court of Appeals affirmed, ruling that the company had violated only general terms of the injunction, which were couched in terms of the act, and that there was no "willful contempt" since neither the law nor the injunctions specifically referred to its practices.

Mr. Justice DOUGLAS, speaking for a majority of the Supreme Court, reversed, declaring that absence of willfulness does not relieve civil contempt. If the injunction was too burdensome upon the company, he said, it should have petitioned for a moderation of the decree. He also held that the fact that the company's violations of the act were not specifically enjoined did not immunize it from contempt liability, since injunctions must often be framed in general terms in order to prevent further violations of law where a proclivity for unlawful conduct has been shown, saying that "where as here the aim is remedial and not punitive, there can be no complaint that the burden of any uncertainty in the decree is on respondent's [the company's] shoulders". He added that there was no doubt that the District Court had power to order the company to purge itself of the contempt by paying the damages caused by its disobedience of the decree.

Mr. Justice RUTLEDGE concurred in the result.

Mr. Justice FRANKFURTER, joined by Mr. Justice JACKSON, dissented. The Court had indicated again and again that a statute could not be made the basis of contempt proceedings merely by incorporating a reference to its broad terms into a contempt order, he declared. He recalled the generality of injunctions against labor unions prior to the Norris-LaGuardia Act, and said that the two lower courts were avoiding "the very evil with which labor injunctions were justly charged". The Court ought not to encourage ambiguity in the terms of decrees he said. Y.

The case was argued by Bessie Margolin for McComb, and by Louis Kurz for the company.

NEGLIGENCE

Proximate Cause—No Liability Where Employee Injured at Task Not Extra-Hazardous Though Necessitated by Negligence of Employer

■ *Reynolds* v. *Atlantic Coast Line Railroad*, 336 U. S. 207, 93 L. ed. Adv. Ops. 475, 69 S. Ct. 507, 17 U. S. Law Week 4206. (No. 234, decided February 14, 1949.)

Petitioner's intestate was a brakeman who was killed in crossing between the sixth and seventh cars on a moving freight train. In a suit under the Federal Employers Liability Act, petitioner alleged that canes negligently permitted to grow beside the track required for signaling a journey from the caboose to the seventh car rather than the sixth as normally, and that intestate would not have had to make the journey at all if the railroad had provided a competent assistant brakeman. Neither the crossing nor the journey was alleged to have been more than usually hazardous. The state supreme court held that the facts alleged did not show that the accident resulted proximately from the negligence of the railroad, though the negligence was adequately charged.

The Supreme Court affirmed in a *per curiam* opinion.

Mr. Justice FRANKFURTER noted that he thought that this was another case in which the petition for *certiorari* should have been denied, referring to his concurring opinion in *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949), *infra*. Since the case did not call for an independent examination of conflicting testimony however, he joined in the Court's disposition.

Mr. Justice BLACK, Mr. Justice DOUGLAS, Mr. Justice MURPHY and Mr. Justice RUTLEDGE dissented without opinion. Y.

The case was argued by J. Kirkman Jackson for the petitioner, and by Peyton D. Bibb for the railroad.

Judge and Jury — Issues in Negligence Action Arising Under Federal Employers Liability Act Must Be Submitted to Jury If Evidence Might Justify a Finding Either Way on Issue of General Use of Barred Danger Spot

■ *Wilkerson* v. *McCarthy*, 336 U. S. 53, 93 L. ed. Adv. Ops. 403, 69 S. Ct. 413, 17 U. S. Law Week 4175. (No. 53, decided January 31, 1949.)

The petitioner, Wilkerson, was injured while at work in a fall from a boardway placed over a wheel-pit in the yard of the railway of which respondents were trustees. Chains on posts at the edge of the pit constituted a barrier difficult, but possible, to avoid. Petitioner brought suit under the Federal Employers Liability Act, alleging that the railroad was negligent in not furnishing him a safe place to work. The trial court directed a verdict for defendant, and the state supreme court affirmed on the ground that the railroad had no knowledge, actual or constructive, that any employees other than the pit-crewmen used the boardway, adding that, had the railroad known that other employees habitually used the plank as a walkway, it would have been reversible error to take the case from the jury.

The Supreme Court reversed in an opinion by Mr. Justice BLACK. He agrees that the case should have been submitted to the jury if the railroad had been charged with knowledge of general use of the plank, but he reiterates the rule that in cases where a jury trial is required issues of negligence must be submitted to the jury if the evidence might justify a finding either way on that issue, and points out that there was testimony at the trial to the effect that employees generally used the walkway. Hence he holds that a question for the jury was presented.

Mr. Justice FRANKFURTER, joined by Mr. Justice BURTON, wrote a concurring opinion in which he said that he does not believe that the Court should grant *certiorari* in cases of this sort where the only question turns upon an appraisal of the evidence. He would therefore, he said, have dismissed the petition as "improvidently granted", but, as that was not to be done, he "had been obliged to recanvass the record". He agrees that there was enough evidence to go to the jury.

Mr. Justice DOUGLAS, with whom Mr. Justice MURPHY and Mr. Justice RUTLEDGE joined, concurring in the Court's opinion, wrote an additional concurring opinion. He reviews the history and purposes of the statute, and the cases decided under it, and declares that the Court's criterion in granting or denying *certiorari* in these cases "is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected".

The CHIEF JUSTICE dissented, saying that in his opinion there was no evidence upon which a jury could have found for the injured employee.

Mr. Justice JACKSON wrote a dissenting opinion, remarking that the majority are in effect holding that a trial or appellate court is usurping the jury's function whenever it weighs evidence or examines facts, and that if so, every claim of injury would require submission to a jury, even where there was no possible basis for a finding of negligence.

Y.

The case was argued by Parnell Black for Wilkerson, and by Dennis McCarthy for the trustees of the railroad.

PATENTS

Claims 18, 20, 22 and 23 of Patent No. 2,043,960 Valid and Infringed, Certain Other Claims Invalid

■ *Graver Tank and Manufacturing Company, Inc.*, et al. v. *Linde Air Products Company*, 336 U.S. 271, 93 L. ed. Adv. Ops. 492, 69 S. Ct. 535, 17 U. S. Law Week 4215. (Nos. 184 and 185, decided February 28, 1949.)

Two suits were brought for infringement of Jones *et al.* patent No. 2,043,960 for an electric welding process and for fluxes to be used therewith. The District Court held four of the flux claims valid and infringed and held certain other flux claims and all the process claims invalid. The Court of Appeals affirmed as to the four flux claims but reversed the trial court and held valid the process claims and the remaining contested flux claims. Both courts found for the plaintiff on the issue of alleged misuse of the patent. *Certiorari* was granted, 335 U.S. 810.

Mr. Justice JACKSON delivered the opinion of the Court, affirming the District Court and reversing the Court of Appeals insofar as the latter Court reversed the District Court. As to the issue involving four claims held valid and infringed, it was said: "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

The Court agreed with the District Court that the remaining flux claims were invalid as broader than the invention, and that in the absence of ambiguity in the claims, reference may not be made to the specification in order to narrow the claims to a valid scope. As to the process claims, the Court again referred to the findings of the District Court and pointed out that ". . . the rules that govern review entitle the trial court's conclusions to prevail . . . ."

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joined, delivered a specially concurring opinion.

W.

The case was argued by Thomas V. Koikka for the Graver Tank and Manufacturing Company, and by John F. Cahill and Richard R. Wolfe for the Linde Air Products Company.

WORKMAN'S COMPENSATION

Longshoremen's and Harbor Workers' Compensation Act — When an Employee Suffers Total Disability to Which a Previous Partial Disability Contributed, Employer Is Liable Only for Disability Caused by Subsequent Injury

■ *Lawson* v. *Suwanee Fruit and Steamship Company*, 336 U. S. 198, 93 L. ed. Adv. Ops. 470, 69. S. Ct. 503,

17 U. S. Law Week 4197. (No. 56, decided February 14, 1949.)

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 908 (f) (1), provides that: ". . . if an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury . . . the employee shall be paid the remainder of the compensation that would be due for permanent total disability . . . out of the special fund established in section 44".

An employee of the Suwanee Company had lost his right eye in an accident unconnected with industry or his employment. He was injured while at work for the company, and is now blind in both eyes. The question before the Court was whether the employer or the special fund was liable for the payments needed to equalize the compensation for total disability. Lawson, the Deputy Commissioner for the Federal Employees' Compensation Commission, had concluded that the employer was liable. The District Court reversed, and the Court of Appeals affirmed.

Mr. Justice MURPHY delivered the opinion of the Court affirming the decision of the Court of Appeals and the District Court. He refers to the language of the statute, and notes that the question turns upon whether or not the word *disability* was intended by Congress to have its ordinary, broad meaning, or the meaning as defined in the statute "incapacity because of accidental injury or death arising out of and in the course of employment". In the light of the incongruity involved in a mechanical application of the definition ("previous incapacity because of accidental injury or *death*"), the unmistakable purpose of the second injury fund, and the interpretation of the state statutes on which the federal act is based, he concludes that the word was intended in its ordinary significance, and that the additional payments are to come from the special fund.

Mr. Justice DOUGLAS dissented without opinion. Y.

The case was argued by Newell A. Clapp for Dawson, and by Harry T. Gray for the company.

Practising lawyer's guide to the current LAW MAGAZINES

ADMINISTRATIVE LAW—*"SEC v. Chenery Corp.: A Case Study in Administrative Technique":* The January issue of the *Harvard Law Review* (Vol. 62-No. 3; pages 478-487) contains a further contribution to the growing volume of literature surrounding the *Chenery* case, 332 U.S. 194 (1947), in which, after having once remanded the case to the Securities and Exchange Commission, the Supreme Court upheld an order of the commission denying parity recognition to the security holdings of a management group which were purchased while negotiations were in progress between the commission and the corporation as to a proper plan of reorganization under the Public Utility Holding Company Act. The commission's order, holding that parity recognition would be "unfair, inequitable and detrimental" within the meaning of Section 11, was stated to be based upon the commission's experience with conflicts of interest in reorganization proceedings. The current note in the *Harvard Law Review* expresses the view that the *ad hoc* procedure followed by the commission was unfortunate as a matter of administrative process, since there were available measures which would have permitted flexible administration and effective control. The author criticizes the commission's failure to indicate in its decision, for the guidance of other "insiders", which aspects of the case were critical and suggests that neither the language of the statute nor the equities involved required the result reached by the Supreme Court. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: $1:00).

ANTI-TRUST LAW—*"Section 3 of the Clayton Act—Coexisting Standards of Legality?":* A note in the February issue of the *Columbia Law Review* (Vol. 49—No. 2; pages 241-250) discusses the question of whether there is a single standard of legality for all arrangements falling within Section 3 of the Clayton Act or whether there are different coexisting standards, a problem raised by the decision in *United States* v. *Standard Oil Company of California*, 78 F. Supp. 850 (S.D. Calif. 1948). The author divides the devices covered by Section 3 into tie-in agreements and requirement contracts and suggests a justification for employing a different standard of legality for each type. After analyzing several important cases decided under this section, he concludes that the court should apply a stringent test of legality (referred to as the quantitative rule) to tie-in agreements, and a more liberal test (the comparative rule), to requirement contracts. In the case of

multiple-requirements contracts, as in the recent *Standard Oil* case, the author believes the comparative rule should be applied unless the supplier has compelled committment for minor articles by reason of extensive control over a major product. (Address: Columbia Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: $1.00).

CONSTITUTIONAL LAW–*"Permissible Scope of Sound-Truck Ordinances":* The January issue of the *Yale Law Journal* (Vol. 58–No. 2; pages 335-340) contains an informative note on the drafting of sound-truck ordinances which will be constitutionally acceptable in the light of the Supreme Court opinions in *Saia* v. *New York*, 334 U. S. 558 (1948). Various dicta from the opinions in that case are selected to point out that statutes which are narrowly drawn to prevent previous restraint of free speech and the resultant possibility of discrimination, will be held valid. Suggestions contained in the majority opinion as to permissible limitations on the time, place and volume of sound-truck use are elaborated upon. The author concludes that statutes designed to prevent sound-amplification abuse may be drafted so long as they do not open the door to indirect censorship of public utterances. (Address: The Yale Law Journal, 127 Wall Street, New Haven, Conn.; price for a single copy: $1.00.)

CORPORATIONS–*"The Legality of Stock Option Grants to Corporate Officers":* A popular device employed by corporations to promote greater individual efficiency among their officers is the granting of stock purchase options. A well-annotated note in the February issue of the *Columbia Law Review* (Vol. 49–No. 2; pages 232-241) discusses the validity of such options as against attacks by minority stockholders. The author states that while option plans are subject to judicial review, the scope of review is narrowly limited by the difficulty in determining the value of the option and the absence of any readily computable measure of excessiveness. The opinion is expressed that, nevertheless, the availability of judicial review serves as a deterrent to overreaching. (Address: Columbia Law Review, Columbia University, New York 27, N. Y.; price for a single copy: $1.00).

FEDERAL PROCEDURE–*"Present and Potential Role of Certification in Federal Appellate Procedure":* An exhaustive study and dissertation on the obligatory jurisdiction of the United States Supreme Court in cases where questions of law are certified from the lower courts is found in the leading article of the January, 1949, issue of the *Virginia Law Review* (Vol. 35–No. 1; pages 1-49). The authors, James William Moore, Professor of Law at Yale University and a recognized authority on federal practice and procedure, and Allan D. Vestal, Instructor of Law at the University of Iowa, have written a fully-annotated article on the certification procedure, detailing its historical development, the attitude of the Supreme Court on its use, the practice when questions are certified and the manner in which the Supreme Court and the lower courts handle such cases. The authors conclude their article with several proposals, the basic one being that the obligatory jurisdiction of the Supreme Court be sharply cut down, if not completely eliminated. In such case, the certification procedure could be useful as a form of petition for *certiorari* for use by the lower courts. A further suggestion is for the extension of the certification procedure whereby the District Courts would have power to certify questions on interlocutory matters to the Court of Appeals. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy: $1.25).

LABOR LAW–*"The Effect of the Public Interest on the Right to Strike and to Bargain Collectively":* The February issue of *The North Carolina Law Review* (Vol. 27–No. 2; pages 204-212) carries a paper by Oscar S. Smith, Director of Labor Relations for the Atomic Energy Commission, which was read at a round table discussion on labor law at a recent meeting of the Association of American Law Schools. The author states that in those activities where work-stoppages would create an immediate danger to the public health or safety, such as the atomic energy industry, the strike is rarely, if ever, appropriate as an effective bargaining aid and that an alternative for the right to strike may need to be provided as a regular adjunct of bargaining. He concludes that, while some progress has been made in the handling of grievances in the atomic energy industry, the basic problem has been to bring about an equality of bargaining power without the imposition of restrictions that, although equal as between employer and employees, "might discourage the resourceful, aggressive, and imaginative leadership needed on the part of both management and labor in the development of this new industry." (Address: The North Carolina Law Review, The University of North Carolina School of Law, Chapel Hill, N. C.; price for a single copy: $1.25).

PRACTICE OF LAW–*"Surveying the Legal Profession":* A timely commentary on the nationwide Survey of the Legal Profession, now in progress, which is sponsored by Carnegie Corporation of New York and the American Bar Association, is contained in an article by Charles O. Porter in the February, 1949, issue of the *Journal of the American Judicature Society* (Vol. 32–No. 5; pages 134-142). The author discusses the methods to be used in conducting the survey, and the main lines of inquiry that will be pursued under various topics of direct interest to all members of the Bar. It is pointed out that the survey is not controlled by this Association, the Carnegie Corporation, or by any group, and that its organization is such as to enable it to carry out its mission with objectivity, even though the nature of the

subject matter necessitates that lawyers direct much of the work of surveying their own profession. (Address: American Judicature Society, Hutchins Hall, Ann Arbor, Mich.; no charge for single copies.)

TAXATION—*"The Taxability of Alimony Payments under Divorce or Separation Agreements":* A discussion of selected problems concerning the taxability of alimony payments since the Revenue Act of 1942 is presented by Curt Gruneberg, Assistant Professor of Economics at Kansas City University, in the December-February issue of the *University of Kansas City Law Review* (Vol. XVII—No. 1; pages 52-61). The author points out that where separation or divorce decrees provide that alimony payments are to be used for the support of both wife and minor children, with no definite amount allocated to the wife and the individual children, the entire amount is taxable income to the wife and deductible by the husband. The effect of various types of state court divorce and separation decrees on the federal tax question, the payment of lump-sum amounts and the applicability thereto of the capital gain and gift taxes, and the position of alimony trusts and annuity policies are among the problems discussed in this article on a most important phase of tax law. (Address: University of Kansas City Law Review, Kansas City 4, Mo.; price for a single copy: $1.00.)

TAXATION—*"Family Real Estate Trusts as Associations for Income Tax Purposes":* A note in the January, 1949 issue of the *Virginia Law Review* (Vol. 35—No. 1; pages 85-97) outlines the difficulty in drafting trust instruments for the conservation of real property without falling within the definition of an association under the federal tax laws, and thus being subjected to the burdens of corporate taxation. The author discusses the pertinent cases in this field, concludes that it was not the intent of Congress that family real estate trusts be subject to taxation as corporations, and suggests that unless the Supreme Court should grant *certiorari* in such a case and accept such trusts as bona fide means of conserving property, Congress revise its existing definition to exempt the trusts from corporate taxation. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy: $1.25.)

TORTS—*Right of Privacy:* In a note in the Winter issue of the *Arkansas Law Review and Bar Association Journal* (Vol. 3—No. 1; pages 105-106) on the recent federal case of *Peay* v. *Curtis Publishing Company,* 78 F. Supp. 305 (1948), where recovery was allowed for the unauthorized publication of the picture of a Washington, D. C., female taxi-driver, the law of privacy is briefly outlined. The author concludes that "Whether the right of privacy exists in Arkansas is an open question. *Mabry* v. *Kettering,* 89 Ark. 551 (1909)", adding that the Arkansas Constitution contains a provision almost identical with the "pursuing and obtaining happiness" provision of the California Constitution which has been construed by the California courts as granting the right of privacy. (Address: Arkansas Law Review and Bar Association Journal, Fayetteville, Ark.; price for a single copy not given.)

TORTS—*"Negligence*—Res Ipsa Loquitur—*Airplane Accidents":* The Winter issue of the *Arkansas Law Review* notes *Smith* v. *Pennsylvania Central Airlines Corporation,* 76 F. Supp. 940 (1948), which case applied the doctrine of *res ipsa loquitur* to an accident involving an airplane operating as a common carrier (Vol. 3—No. 1; pages 102-105). After a brief review of the prerequisites to invoking *res ipsa loquitur,* the author of the note points out why, in his opinion, this ancient aid to proof-poor plaintiffs is pecularly suited to a common carrier airplane disaster. (Address: Arkansas Law Review, University of Arkansas, Fayetteville, Ark.; price for a single copy not given.)

TORTS—*Libel and Slander—"History of Defamation"* A concise review of the historical development of the law of defamation by R. C. Donnelly, Associate Professor of Law, University of Virginia Law School, is in the January, 1949, issue of the *Wisconsin Law Review* (Vol. 1949—No. 1; pages 99-126). Professor Donnelly traces the extent to which the interest in reputation was recognized in the early local courts in England, the ecclesiastical courts, the common-law courts, and the Star Chamber, culminating in the distinction between libel and slander and the actionability of written and spoken words. He regards such distinction as anomalous in view of present day methods of communication and urges an overhauling of the law of defamation by legislation. (Address: Wisconsin Law Review, Madison, Wis.; price for a single copy: 75 cents.)

TRADE REGULATION—*"Jurisdiction of the Federal Trade Commission—Multiple Basing Point System—Unfair Method of Competition—Price Discrimination":* In a comment in the February issue of the *Southern California Law Review* (Vol. XXII—No. 2; page 164-175), there is a discussion of certain questions raised by the recent decision in *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683 (1948), in which the Supreme Court condemned the "multiple basing point" system of the cement industry. The conflict of jurisdiction between the Federal Trade Commission and the Attorney General in cases charging combinations to restrain trade under the Sherman Act, the legal precedents on questions of freight absorption and phantom freight, and the economic effects of the system are considered. Particular attention is paid to such economic characteristics as freight absorption and interpenetration, location of production, and the effect the system has on an industry's price structure. (Address: Southern California Law Review, 3660 University Avenue, Los Angeles 7, Cal.; price for a single copy: $1.25.)

Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE

Admiralty . . . maritime liens . . . claims for refund of passage prepaid for cancelled voyage are not maritime liens . . . in marshaling maritime liens against ocean-going vessels, priority is inverse to order of accrual, by voyages.

■ *Todd Shipyards Corp.* v. *SS "City of Athens"*, U. S. D. C., Md., February 28, 1949, Chesnut, J. (Digested in 17 U. S. Law Week 2425, March 15, 1949).

The *SS City of Athens*, a former troop transport reconverted in 1946, made one trans-Atlantic round trip that year and three more in 1947 before she was libeled in Baltimore; the proceeds of subsequent sale by the Marshal amounted to less than the total allowed as lien claims by the Commissioner. Two principal exceptions taken to the Commissioner's report were (1) to the rejection, as maritime liens, of claims for refund of prepaid passenger fares, and (2) to the allowance of priority to all liens accruing after January 1, 1947. The Court sustained the Commissioner on both points.

The Court held that cancellation of scheduled voyages following the libel did not create a maritime lien for refund of prepaid fares or for incidental damages occasioned by the nonsailing. Justification for this view was found in the nature of the maritime lien, which was said to be "secret". The maritime lien, in the Court's opinion, arose only after a "union of ship and cargo" (passenger) or other "visible occurrence"; breach of an executory contract gave rise to, at most, an action *in personam*.

As to the second issue, the Court, after review of the cases, maintained that the rule applicable to ocean-going vessels required priority to be given, in inverse order of accrual, to liens arising on the most recent voyage over liens arising on earlier voyages; the Court refused to adopt the suggestion of counsel for deferred lienors that the rule should be modified to accord equal priority to all liens arising within a full year prior to libel. (As to coastwise, harbor and inland-water vessels, the Court agreed that the rule had often been modified to base priority upon other criteria.) Since, in the instant case, the available funds were sufficient to pay in full all liens accruing on the last three voyages which took place in 1947, the Commissioner was deemed correct in making calendar year 1947 determinative of priority.

Aliens . . . deportation or exclusion . . . orders not reviewable by action for a declaratory judgment.

■ *Valenti* v. *Clark and Miller*, U. S. D. C., D. C., March 16, 1949, Holtzoff, J.

In an action against the Attorney General and the Commissioner of Immigration and Naturalization, plaintiff, a resident alien who had been arrested pursuant to a deportation warrant on the ground that he had been convicted of a crime involving moral turpitude within five years after his entry into the United States, sought a declaratory judgment that the charge on which he was convicted did not involve moral turpitude and that he was therefore not subject to deportation.

Dismissing the complaint, the Court held that an action for a declaratory judgment to review deportation or exclusion orders of the Attorney General was not maintainable under either the Declaratory Judgment Act or the Administrative Procedure Act. The Court stated that, although a person claiming to be a citizen has a right to secure an adjudication of his status by a declaratory judgment action, either against the Secretary of State or the Attorney General, deportation or exclusion orders were "matters of an entirely different type". To permit their review by a declaratory judgment in an action against the Attorney General which could be maintained only in the District of Columbia would, in the Court's opinion, hamper and "possibly even frustrate" the enforcement of the immigration laws. The Administrative Procedure Act, if applicable, was said to provide specifically and expressly that the type of previously existing review should be the remedy followed under it. That was held to be a *habeas corpus* proceeding in the district in which the alien was held in custody.

Civil Aeronautics Board . . . irregular air carrier and off-route rules . . . commercial operator certification and operation rules . . . revision announced.

■ Code of Federal Regulations, Tit. 14, Ch. 1, Pt. 42, §§ 42.0-42.96 (14 Fed. Reg. 1427).

The CAB announced, in the *Federal Register* of March 31, 1949, the revision of Part 42—Irregular Air Carrier and Off-Route Rules, and Part 45—Commercial Operator Certification and Operation Rules, of the

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EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

Civil Air Regulations Effective June 1, 1949. The purpose of the revision of Part 42 is to provide a level of safety in irregular operations in transport-type aircraft equivalent to that required of the scheduled air carriers, insofar as the inherent differences in scheduled and nonscheduled operations permit. New requirements are set forth to insure comparable airman competency, aircraft equipment, maintenance and operating limitations for passenger carriage. The provisions of Part 42 are applicable to irregular air carriers operating in interstate, overseas or foreign air transportation, to Alaskan air carriers authorized under § 41 of Chapter 1, and to air carriers holding scheduled air carrier operating certificates when making charter trips or when performing other special services. Part 45 makes applicable to contract operators of aircraft certificated for a maximum take-off weight of 12,500 pounds or more the same requirements as are applicable to common carriers operating similar aircraft on other than a scheduled basis. Operators of small aircraft will be requested to observe the same rules as those applicable to common carriers utilizing the same type aircraft on other than a scheduled basis.

Courts . . . jurisdiction . . . jurisdiction of Court of Claims under Air Corps Act of 1926 and Secrecy or Voluntary Tender Act is exclusive.

■ *Fulmer* v. *U. S.*, U. S. D. C., N. D. Ala., March 7, 1949, Lynne, J. (Digested in 17 U. S. Law Week 2434, March 22, 1949).

This action was brought against the United States for compensation for alleged infringement of plaintiff's patented invention, a "bomb sight indicating chart for aircraft", which he had in 1942 divulged to the government-sponsored National Inventors Council. Defendant's motion for summary judgment was granted, the Court being of the opinion that it had no jurisdiction under any acts whereby the United States had consented to be sued .

The Court held that both the Air Corps Act of 1926, 10 USC § 310 (i), and the Secrecy or Voluntary Tender Act, 35 USC § 42, conferred jurisdiction exclusively on the Court of Claims. Moreover, the Court doubted the compensability of the alleged infringement under the former Act, since plaintiff's indicating chart was not within the defined class of "designs . . . relating to aircraft or any components thereof", or under the latter Act, since plaintiff was not "an applicant whose patent is withheld" nor had he "ultimately received a patent" within its terms. The Tucker Act, 28 USC § 41 (20), did not, in the Court's opinion, aid plaintiff's case under the other two acts, because the Tucker Act did not confer concurrent jurisdiction on the District Courts to determine compensation under acts lodging exclusive jurisdiction in the Court of Claims. Nor did it afford him any independent right of recovery since he had shown, in his affidavit and deposition, insufficient facts to establish a contract, express or implied, for use of his indicating chart by defendant. Since an unpatented invention could not be the subject of "damage to or loss of property" within the language of the statute, and since there was no showing of use by defendant to support a charge of unjust enrichment, the Federal Tort Claims Act, 28 USC § 2671 *et seq.*, was similarly held unavailing to plaintiff.

Crimes . . . obscenity . . . books held to be obscene within meaning of Pennsylvania obscenity statute only when they are sexually impure and pornographic, and result or will result in the commission of criminal behavior.

■ *Commonwealth of Pennsylvania* v. *Gordon*, Pa. Ct. Quar. Sess., March 18, 1949, Bok, J.

Defendant booksellers were indicted for possession for sale of certain allegedly obscene books in violation of a Pennsylvania statute (§ 524 of P. L. 872, 1939) banning the sale of obscene literature. The books were *The Studs Lonigan Trilogy* and *A World I Never Made* by James T. Farrell, *Sanctuary* and *Wild Palms* by William Faulkner, *God's Little Acre* by Erskine Caldwell, *End as a Man* by Calder Willingham, and *Never Love a Stranger* by Harold Robbins. The Court sustained defendants' demurrers to the evidence and found that they were not obscene, but within the protection of the First and Fourteenth Amendments of the Federal Constitution.

After an exhaustive survey of English and American cases on literary obscenity, the Court rejected the concept of *Regina* v. *Hicklin*, L. R. 3 Q. B. 360 (1868) that the criminal law is "the *custos morum* of the King's subjects" and held that the obscenity statute could not constitutionally be applied to any writing unless it was sexually impure and pornographic, and then only where there was a reasonable and demonstrable cause to believe that a crime or misdemeanor had been committed or was about to be committed as the perceptible result of the publication and distribution of such writing. Pointing out that obscenity did not have a fixed meaning in the criminal law of Pennsylvania, the Court stated that it was his purpose to provide an apparent inherent standard of evil by which obscenity was to be judged from book to book. Judge Bok agreed with the cases which restrict the meaning of obscenity to sexual impurity. He defined sexual impurity in literature as any writing whose dominant purpose and effect was erotic allurement, a "calculated incitement to sexual desire". The Court maintained that the causal connection between the reading of the book and the criminal behavior must appear beyond a reasonable doubt. The books under consideration were neither obscene in the defined sense nor was there any proof that they incited to immoral behavior. The sustaining of the demurrers followed.

Evidence . . . privilege . . . state court held without jurisdiction to compel disclosure of veteran's medical history as contained in records of Veterans' Administration.

■ *Pratt* v. *Arden Farms Co.*, Cal. Superior Ct., March 2, 1949, Hanson,

J. (Digested in 17 U. S. Law Week 2421, March 15, 1949).

Defendant in this personal injury action sought a court order to compel the production and enable the inspection of plaintiff's medical history as contained in the records of the Veterans' Administration. At a deposition hearing production of the record was refused on the ground that it was confidential and privileged. In a memorandum ruling, the Court held that as a state court it lacked jurisdiction under federal law to compel such production by the Administration. Reference was made to 38 USC § 456, which makes confidential and privileged the files, records and reports pertaining to a veteran in the possession of the Veterans' Administration, and provides that no disclosure thereof may be made except to the veteran involved or his duly authorized representative or "where required by the process of a United States court to be produced in any suit or proceeding therein pending; or when such production is deemed by the Administrator of Veterans' Affairs to be necessary in any suit or proceeding brought under the provisions of this chapter". Deeming the statute to be for the benefit of the veteran alone, the Court denied defendant's motion for an order requiring plaintiff to file with the Administrator an authorization permitting the inspection by defendant. The Court found no support for defendant's position in the California Uniform Business Records as Evidence Act, or the state statute, C.C.P. 1881, regarding the testimony of physicians in personal injury actions.

Federal Power Commission . . .public interest . . . where parties had proceeded on assumption that otherwise unapprovable transaction was not within Commission jurisdiction, approval given in order to avoid hardship.

▪ *In re Arkansas-Missouri Power Co.* and *St. Francis Electric Generating Co.*, Opin. No. 176, FPC, March 4, 1949.

Applicant "Ark-Mo" in May, 1948, adopted the "St. Francis Plan" to finance construction of a needed electric-generating plant. That plan contemplated construction and ownership of the plant by applicant St. Francis, a new corporation set up exclusively for that purpose, and operation of the plant by Ark-Mo under a long term lease with option to purchase. The lease rentals were to be geared to the debt payments to be made by St. Francis, which would finance the project by borrowing $5,500,000 and issuing $10,000 in stock to outsiders. Considered on a consolidated basis, the percentage of equity capitalization of Ark-Mo would be reduced from 36.4 per cent to 20.9 per cent. Preliminary work was undertaken on the assumption that the FPC had no jurisdiction; in January, 1949, after a conference with FPC staff members, a joint application was filed for FPC approval of the transaction under § 203 of the Federal Power Act, or, in the alternative, for a disclaimer of jurisdiction.

The Commission's opinion indicated disapproval of the plan as not in the public interest, criticizing the proposed all-debt financing of the power plant though it would produce savings in federal income taxes and in the over-all cost of money. It also intimated that Ark-Mo would have an "unbalanced capital structure" and deplored the "speculative possibilities" of the St. Francis stock. In view of the extent to which preliminaries had gone, however, the Commission recognized that complete disapproval would cause monetary loss and delay in completion of the facilities; accordingly, approval was given conditioned upon acquisition of the St. Francis stock by Ark-Mo within three years, to be retained thereafter "until the Ark-Mo acquired the assets of St. Francis by purchase or corporate merger or consolidation". The opinion stressed the emergency nature of this solution, and warned future applicants against reliance thereon as a precedent.

Insurance . . . automobile liability insurance . . . insured's protection under liability policy held not limited to stated amount of coverage where insurer, exercising exclusive right under policy, in bad faith rejects offer of settlement.

▪ *American Fidelity and Casualty Co., Inc.* v. *G. A. Nichols Co.*, C. A. 10th, March 21, 1949, Phillips, Ch. J. (Digested in 17 U. S. Law Week 2448, March 29, 1949).

Defendant insurer rejected an offer, made after both sides had rested, to settle for $10,000 (the amount of the insured's liability coverage) a tort claim against plaintiff insured. The amount by which the subsequent judgment exceeded $10,000 was paid by the insured, who then sued the insurer for reimbursement. Judgment for the insured was affirmed.

The Court reasoned that the insurer had, under the policy, the sole right to settle; that exercise of the right entailed a fiduciary obligation to consider the interests of the insured as well as those of the insurer; that the evidence in the tort action was almost conclusively against the insured at the time the offer was made and rejected; that the insurer had, therefore, little to lose by settling, whereas refusal to settle subjected the insured to almost certain loss; that the jury were justified in making a special finding that the insurer acted in bad faith; that the insurer was, accordingly, liable for the full amount of the judgment.

In reaching this conclusion, the Court held inapplicable a clause in the policy that "no action shall lie against the [insurer] for penalty because of . . . refusal . . . to satisfy any . . . offers of settlement . . . " The Court maintained that the term "penalty" limited the operation of the clause to "an extraordinary liability" exacted by law against a wrongdoer in favor of the person wronged, rather than merely compensation for loss or injury. Moreover, if the clause purported to apply to the present action, the Court deemed it void under 15 Okla. St. Ann. §212 classifying as opposed to public policy contracts exempting one from responsibility for his own fraud.

Insurance . . . fire insurance . . . "inherent explosion clause" of policies covers gas explosion caused by removal of valve in gas line in basement of home.

■ *Gerrity* v. *The Charter Oak Fire Insurance Co.*, U. S. D. C., D. C., March 2, 1949, Holtzoff, J.

Plaintiffs sought to recover under the "inherent explosion clause" of three fire insurance policies for losses caused by an explosion occurring in their home when a valve was removed from a gas line in the basement and the gas subsequently exploded. It was inferred from the agreed facts that an occupant of the house, who was killed in the explosion, had accidentally or negligently disconnected the gas pipe. The clause provided that insurance under the policies was to include "liability for any direct loss caused by explosion occurring in the . . . dwelling . . . from hazards inherent therein . . . "

The Court held that the explosion was a consequence of the very nature of the gas-supplying apparatus and hence was due to a "hazard inherent therein" within the terms of the clause. The Court, defining inherent hazards as those that "constitute a necessary and permanent characteristic, quality, or attribute of the structure or article", considered it immaterial whether the explosion was the result of some defect in the manufacture, installation, or maintenance of the apparatus, or was caused by carelessness or negligence in handling. The case of *Davies* v. *Hartford Fire Insurance Company*, 75 F. (2d) 442 (CCA 8th), where a similar explosion was held not covered by a clause insuring against loss due to "hazards inherent in the occupancy", was distinguished on the ground that the explosion in that case had been maliciously caused by unknown persons with intent to destroy the house, and, therefore, was not due to an inherent hazard.

Jury . . . Composition . . . Communists' charge that particular groups and classes were deliberately excluded from jury lists in the U. S. District Court for the Southern District of New York found groundless.

■ *U. S.* v. *Foster et al.*, U.S.D.C., S.D. N.Y., Medina, J., March 4, 1949.

Defendants, indicted for conspiracy to advocate the forcible overthrow of the Government, filed a challenge to the array and moved to quash and dismiss the entire panel, venire and jury list, and to dismiss the indictments on the ground that there had been a deliberate and systematic exclusion from the jury lists for the United States District Court for the Southern District of New York of Negroes, women, Jews, manual workers, poor persons and members of the Communist and American Labor parties. The claim was further made that the statutory $250 property qualification for jury service and the "limitation" of $4 *per diem* jury fees (recently increased to $5 *per diem* by P. L. No. 779, 80th Cong., 2d Sess., which became law on June 25, 1948) were unconstitutional and discriminatory against the poor members of the working class.

Overruling the challenge and denying the motions, the Court, while it stated that it was essential that there be a fair and impartial cross-section of the community, found from the evidence that there had been no discrimination or exclusion of any kind in the selection of prospective jurors, and that the methods used in compiling the jury lists were in compliance with the applicable statutory provisions. The Court stated that a requirement that those administering the system must produce proportional representation on juries of social, economic and political groups was not only contrary to all legal precedent, but would result in "chaos and confusion" and "inevitably breed the very intolerance which every right-minded person should be vigilant to avoid." It noted and approved of the wide discretion reposed by law in officials charged with administering the jury system.

In regard to maps and charts put in evidence by defendants, Medina, J., asserted that "the method of sampling the panels, the use of different groups of panels for different charts and tables, the repeated assumptions and estimates of questionable validity necessary to relate these materials to the statutory definitions of qualified jurors, and the complete lack of any standard statistical method, make it impossible to draw any satisfactory and reliable conclusions from such materials as to the methods and practices followed by the jury clerk and his assistants in summoning prospective jurors and determining their qualifications for service as grand or petit jurors." The Court described as "frivolous" defendants' claim as to the unconstitutionality of the property qualification for jury service, and stated that the wisdom of these provisions was a matter for the consideration of the Congress.

Libel and Slander . . . admissible evidence includes witnesses' views as to damage to plaintiff's reputation . . . testimony as to third persons' reactions to libel held within exception to hearsay rule.

■ *Mattox* v. *News Syndicate Co., Inc.*, C.A. 2d, March 11, 1949, L. Hand, C.J.

Defendants, in a 1946 New York newspaper article reviewing a 1938 murder in Norfolk, Virginia, mentioned plaintiff's affidavit as to what she saw from her porch, a detective's demonstration that she could have seen no such thing, and a report that she had once been a patient in a mental institution. Plaintiff's subsequent libel action was successful; defendants appealed on the ground that improper evidence of damage was admitted. The judgment was affirmed.

The Court applied Virginia law on the theory that circulation of some 32,000 copies of the newspaper in the vicinity of Norfolk constituted communication there, and on the theory that, there being no evidence that defendant was known in New York, whatever damage she suffered was in Virginia. Under the Virginia law, as read by the Court, an allegation of insanity is libelous per se and the extent of the damages is

the measure of the liability; accordingly, evidence of neighbors' inquiries as to the truth of the article, and that after the publication plaintiff avoided society and parties, appeared nervous, and, by her own statement, was "self-conscious and embarrassed", etc., was deemed admissible. Since damage to a libeled plaintiff's reputation is the aggregate of many persons' reactions to the libel, it was held within the trial court's discretion to admit testimony of individuals that they thought the publication injurious to plaintiff's reputation. Testimony that third persons had told the witness of their reactions to the article was deemed within an exception to the hearsay rule, since "when a person's feelings or beliefs are relevant, his declaration is competent evidence of their existence".

Monopolies . . . interstate commerce . . . federal court has jurisdiction under Sherman Act where complaint alleges that conspirators' restriction of number of taxicabs operating between railroad stations in Chicago burdens interstate rail travel.

■ *Eastman* v. *Yellow Cab Co.*, C.A. 7th, March 11, 1949, Duffy, J. (Digested in 17 U. S. Law Week 2433, March 22, 1949).

Plaintiffs, associated independent taxicab drivers, sought by this action to free themselves from restrictions imposed under ordinances of the City of Chicago, allegedly as part of a conspiracy in restraint of trade to which the city and various defendant taxicab companies were parties. Defendant companies were alleged to hold the bulk of long-term taxi licenses issued pursuant to an ordinance limiting the total number of licensed taxis in Chicago to 3000; plaintiffs had been issued short-term permits containing various restrictions not placed on long-term licensees, and the city had undertaken to cancel all such permits and prevent plaintiffs from operating in Chicago after January 22, 1948. The complaint asserted federal jurisdiction under the Sherman Act, the Fourteenth Amendment and various federal statutes, largely upon the allegation that interstate railroad passengers were impeded in transferring from station to station because of the artificially-created taxicab shortage in Chicago. Dismissal of the complaint was reversed on appeal.

The Court held that, in view of the allegation as to the conspiracy to interfere with interstate rail travel which resulted in a shortage of cabs, the complaint stated a cause of action under the Sherman act. *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (unsuccessful anti-trust action against some of same defendants), was distinguished on the ground that the complaint in that case sought to find a burden on interstate commerce in restraint or monopoly of taxicab service for Chicagoans beginning or ending interstate travel, which the Supreme Court held to affect interstate commerce too remotely.

Moreover, the Court held, a cause of action had been stated under the Fourteenth Amendment since, if the facts in the complaint were taken as true, the City's regulations were arbitrary and discriminatory, part of a scheme whereby "strongly entrenched taxicab interests . . . retain their dominant position". Among such facts the Court adverted to provisions requiring plaintiffs to operate each cab independently, instead of with relief drivers as in the case of defendant companies, and to provisions prohibiting plaintiffs from using and advertising their association name, though no such prohibition was applicable to defendant companies.

Munitions Board . . . National Industrial Reserve Act . . . procedures prescribed for administration of Act.

■ Code of Federal Regulations, Tit. 34, Ch. 1, Subch. A, Pts. 111, 112, 113 (14 Fed. Reg. 1491).

The Munitions Board, on March 31, 1949, announced the adoption of procedures for implementation of the National Industrial Reserve Act of 1948, P. L. 883, 80th Cong. The regulations in this subchapter establish for the National Military Establishment, the Federal Works Agency, and the government disposal agencies, policies and procedures relating to the establishment and administration of the National Industrial Reserve under the authority of the Act. The regulations, which became effective April 1, 1949, set forth the method of designating properties for the Reserve, the procedures governing their maintenance and utilization while in the Reserve, and the procedures for taking property out of the Reserve. A National Security Clause, under which a dormant estate is reserved by the government in the event of transfers of property in the Reserve, is formulated.

Venue . . . federal courts . . . diversity jurisdiction of federal courts does not extend to action for separate maintenance.

■ *Garberson* v. *Garberson*, U. S. D. C., N. D. Iowa, March 8, 1949, Graven, J. (Digested in 17 U. S. Law Week 2435, March 22, 1949).

After defendant in an action for separate maintenance had removed the case from an Iowa state court to the United States District Court, alleging diversity, plaintiff moved that the action be remanded to the Iowa courts, alleging lack of federal jurisdiction. The motion to remand was granted.

The Court readily found diversity of citizenship, in accordance with the rule that the wife's domicile need not follow that of the husband where the latter has been guilty of marital misconduct. It also found that the amount in controversy exceeded $3000. The novel question was presented, however, whether there was federal jurisdiction in that an action for separate maintenance was not a "civil action" within the meaning of § 1332 of the Revised Judicial Code. While "the inherent power of the court of equity to grant separate maintenance" was said to be "well established in Iowa", the Court deemed itself bound by the settled rule, stemming from dictum in *Barber* v. *Barber*, 62 U. S. 582, that only state courts have jurisdiction over domestic relations.

Venue . . . *forum non conveniens* . . . inherent power of federal courts to refuse jurisdiction where action should have been brought in foreign court held to survive § 1404(a) of new Judicial Code.

■ *DeSairigne* v. *Gould,* U.S.D.C., S.D.N.Y., February 25, 1949, Coxe, J.

Action was brought by a French citizen, resident in the United States, against a United States citizen, resident in France, for damages for breach of an agreement entered into in France. The complaint asserted a right to recovery predicated upon French law, which, according to the Court, was "different from, and inconsistent with" domestic law. Service was had upon defendant's attorney-in-fact in New York. Defendant, in a motion to dismiss, alleged that his infirm condition of health prevented his coming to this country, and that his assets in France were sufficient to meet any judgment. The motion was granted.

The Court applied the doctrine of *forum non conveniens* and refused to take jurisdiction, pointing out that witnesses would be more readily available and the conduct of the case would be in the hands of a court conversant with the applicable law if the action were prosecuted in France. The Court rejected plaintiff's argument that §1404 (a) of the new Judicial Code had so codified the doctrine as to make it applicable only to cases transferable from one federal district court to another. This contention was said to be "unsound, for it would strip a federal court of its inherent power to refuse jurisdiction in cases which . . . should have been brought in a foreign jurisdiction".

Further Proceedings in Cases Reported in this Division

■ The following action has been taken in the United States Supreme Court:

AFFIRMED, March 28, 1949: *Schnell et al.* v. *Davis et al.*—Elections (35 A.B.A.J. 332; April, 1949).

CERTIORARI GRANTED, March 14, 1949: *U.S.* v. *Wittek*—War (34 A.B.A.J. 1051; November, 1948).

CERTIORARI DENIED, March 28, 1949: *Schoen* v. *Mountain Producers Corp.*— Venue (35 A.B.A.J. 65; January, 1949).

APPEAL DISMISSED, April 5, 1949: *Bunn* v. *State of North Carolina*—Constitutional Law (35 A.B.A.J. 233; March, 1949).

LONDON LETTER

H. A. C. Sturgess • Librarian and Keeper of the Records, Middle Temple

■ The Juries Bill which was introduced in the House of Commons in December, 1948, makes provision for the payment of jurors, and for the abolition of special juries. Compensation is to be paid for loss of earnings which would otherwise have been made, or for additional expense to which the juror would not otherwise have been subject. It also proposes to pay traveling and subsistence allowances. The actual amounts which may be payable under these heads are to be fixed by regulations made by the Secretary of State in the form of statutory instruments, and they will therefore be under the control of Parliament. But it is laid down in the Bill that the amount to be paid as compensation for loss of earnings must not exceed ten shillings if the time occupied does not exceed four hours, and twenty shillings if four hours are exceeded. On the second reading of the Bill the Attorney General stated that the traveling allowance will be the actual cost of traveling from home to court at the third-class fare, and the subsistence allowance will not exceed five shillings a day. These sums are not intended to be extravagant, but they will, in general, put an end to the hardship, frequently experienced by those called up for jury service, by loss of earnings in their normal avocations. The abolition of special juries met with some opposition in the House, and at times approached a political rather than a legal discussion. A special juror is at present obliged to possess some property qualification, for which the Juries Act of 1870 makes provision. He must have a house rated in London or other large town at not less than £100 a year, or in a country district at not less than £50. Also, if he is "legally entitled to be called an esquire, or shall be a person of higher degree, or shall be a banker or a merchant", he is qualified to be placed upon the list of special jurors. Incidentally there are now ten classes of persons who are legally entitled to be designated esquire in England. A barrister-at-law, by reason of his office or profession, is so entitled; but a solicitor is not, unless he is in a dominion or colony where fusion of the two branches of the legal profession exists. It should be noted, however, that practicing barristers and solicitors are not eligible to serve on juries. To qualify as a common juror a person must be a householder rated in London at £30 a year, or in the country at £20.

One exception to the abolition of special juries is provided for in Clause 19 of the Bill where it is expressly stated that the Act "shall not apply to the trial by a City of London special jury of an issue in a cause entered in the commercial list for trial at the Royal Courts of Justice in the King's Bench Division of the High

Court". The point in retaining the City of London special jury is to get the expert knowledge of commercial matters which is lacking in any special jury one may get on assize.

Grand juries, which consisted of a body of from twelve to twenty-three men of a county returned by the sheriff to every session of the peace, and every commission of oyer and terminer and of general gaol delivery, were abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1933.

Middle Temple Hall Restoration Proceeds

Repairs to and restoration of the famous Middle Temple Hall are now proceeding with greater speed, and there is good hope that it may again be in general use during Her Majesty's tenure of office as Treasurer. Rapid progress has been made in restoring those parts of the roof which were badly damaged by fire during the war, and it has been found possible to use much of the old timber in the process. The hammer-beams, two of which were splintered by the explosion which did so much damage to the Hall, have been repaired with seasoned oak, so skillfully that it is impossible to trace which is new and which is old. The elaborately carved screen with its elegant two-leaved doors, is being reassembled by experts and may soon be occupying its former position in the Hall. It is now in course of having the grime of centuries removed from its surface and the beautiful grain of the old oak is being revealed. Even when the work is finished it is doubtful if it will be possible to resume the custom of dining in Hall as a condition of call to the Bar. Certainly it could not be done for the prewar cost, and it is equally certain that the dinner provided would be very poor by comparison with the prewar meal. In those happy days of plenty a very substantial meal, with two bottles of wine for each mess of four, was supplied for the sum of five shillings, and beer was free. One bottle of wine today would cost three times the amount of one complete prewar dinner.

Mistake in Official Reports of Parliamentary Debate

It is seldom that a mistake appears in the Official Report of Debates in the House of Commons (Hansard) but, on the fifteenth of February, it was reported that an amendment to the Landlord and Tenant Bill was negatived when, in fact, it was agreed to. When the matter was raised in the House on the following day it was stated by Mr. Speaker that Hansard is not an official report. The official report, he said, is one "which it is my duty to peruse daily. I did peruse the official report, which is the accurate one, and it says 'Another Amendment made', which is the correct wording." A little more light was shed on the matter the next day, when the Speaker noted as one of the difficulties of the English language that one word can really have two shades of meaning, which was perfectly true of the word "official". He said that Hansard is the official report of Parliamentary debates, that means it is a report by people who are officially appointed as part of the staff of the House of Commons to report what is said in the House. That is the extent of the official position of Hansard. There is no authoritative matter in its record. The official report, which was in the "Votes and Proceedings" showed that the amendment had been passed. The Speaker further pointed out that Hansard is not accepted in the courts. Under the Evidence Act, 1845, copies of the Commons Journals are admitted in evidence without proof of the printing. Copies of Hansard, however, are not so admitted as evidence of facts therein stated. As further proof of this it was noted that in 1917 there was a case where a common informer sought to recover a penalty from a member of the House on the alleged ground that he had sat and voted whilst disqualified. The learned judge refused to allow the member's presence in the House to be proved by the publication of what he called "the Official Debates of the House of Commons". Witnesses had to be called in to prove his presence in the House. It was readily agreed that this explanation did prove the two shades of meaning in the word "official", and the Speaker gave it as his opinion that "Parliamentary Debates, Official Report" really means Parliamentary Debates—what has been said, and not procedure. Many tributes, however, were paid to the remarkable accuracy of Hansard.

Lords Refuse To Abolish Capital Punishment

When the Criminal Justice Bill was placed before the House of Commons last year there was no clause in it dealing with capital punishment. On its progress through the House a clause was introduced providing that no person should be sentenced to death for murder and, by a free vote, the clause was passed by a small majority. It was, however, deleted when the bill was considered in the House of Lords and the remainder in due course found its way to the statute book.

The matter has now been revived, and a Royal Commission on Capital Punishment has been set up with the following terms of reference: "To consider and report whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified, and if so, to what extent and by what means, for how long and under what conditions persons who would otherwise have been liable to suffer capital punishment should be detained, and what changes in the existing law and the prison system would be required; and to inquire into and take account of the position in those countries whose experience and practice may throw light on these questions."

It was thought that it would be much more useful if the Royal Commission inquired into modifications or alternatives to the death penalty rather than it should be asked to make recommendations as to its continuance or its total abolition, because, as was stated by the Prime Minister, "the straight issue of capital punishment is one on which Parliament in due course will have to take its decision".

THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

The North Atlantic Pact

■ The network of self-defense agreements under Article 51 of the United Nations Charter was strengthened on April 4, 1949, by the conclusion of the North Atlantic Pact. It differs in several respects from the Rio Treaty of 1947 and the Brussels Pact of 1948, which were analyzed in this column at the time of their adoption. To acquaint the readers of the *Journal* with the details of the new pact, we reprint below excerpts from the White Paper published on the subject by the Department of State (Publication 3462).

A Treaty for Collective Defense

■ *Purposes and Objectives:* The North Atlantic Pact is a brief and simple document. The powerful impact it can be expected to have on world affairs derives from three factors: (1) the stature and strength of the states which have indicated their intentions of becoming members of the arrangement; (2) the precarious world security situation to which it will bring a corrective influence; and (3) the developing unity of the North Atlantic community, historically evident throughout more than a half century of increasing interdependence but here formally recognized for the first time.

The preamble of the Pact declares that:

> The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments.
>
> They are determined to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law.
>
> They seek to promote stability and well-being in the North Atlantic area.
>
> They are resolved to unite their efforts for collective defense and for the preservation of peace and security.

Commitments Under the Pact: In the first article of the treaty the parties specifically reaffirm their obligations under the Charter to settle any international disputes in which they may be involved, not only with each other but with any nation, by peaceful means and in such a manner that peace, security, and justice are not endangered and to refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

In subsequent articles the parties undertake the following commitments:

1. To strengthen their free institutions, promote conditions of stability and well-being, and encourage economic collaboration;
2. To maintain and develop their individual and collective capacity to resist armed attack;
3. To consult if the territorial integrity, political independence, or security of any one of the parties is threatened; and
4. To consider an armed attack on any one of the parties as an attack against all and, consequently, to take such individual and collective action, including the use of armed force, as each party considers necessary to restore and maintain the security of the North Atlantic area.

By entering into the North Atlantic Pact the United States would reaffirm its determination expressed in the United Nations Charter to participate in "effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression". It would undertake, in cooperation with the other parties to the treaty, to maintain and develop adequate capacity to resist armed attack. By entering into this arrangement it would recognize the fact that any armed attack upon any nation party to the treaty would so threaten the national security of the United States as to be in effect an attack upon the United States.

Under the United States Constitution the Congress alone has the power to declare war. This constitutional question, however, does not present a real obstacle to the Pact. The United States certainly can obligate itself in advance to take such action, including the use of armed force, as it deems necessary to meet armed attack affecting its national security. The fact that the fulfilment of a treaty obligation—as far as a declaration of war is concerned—depends upon the action of Congress does not inhibit the United States from undertaking the commitment. It is believed that the spirit underlying the North Atlantic Pact, as well as its language, correctly expresses and makes clear the determination of the American people to resist such attack by whatever means may be necessary.

Armed Attack: Article 5 of the Pact comprises a solemn engagement that each party will exercise honest and genuine judgment in determining what action is necessary for the restoration of peace when another party has been attacked. The purpose of the Pact is to strengthen the peace by making clear that the parties are prepared to do their utmost, individually or together, to maintain it and to act together if any one of them is attacked. The parties to the Pact believe that they have the most to lose and the least to gain from another conflict. They are convinced that, while defeat may mean complete disaster, even the victor in a modern war loses more than it gains. They are convinced that war itself

must be prevented. The North Atlantic Pact is their joint effort, in keeping with the spirit and obligations of the Charter of the United Nations, to insure peace and prevent war. It is an agreement among nations which have given clear proof that they do not wish war, that they wish only to live in peace and security, and that they will defend themselves when attacked.

The clear intention of the parties to the Pact to take united action, coupled with the preparation of the means to do so, should remove the danger of miscalculation by any potential aggressor that he could succeed in overcoming them one by one. If a similar clear indication of the firm intention of the free nations had been given early enough in the course of Nazi aggressions, the Axis Powers might well have stopped before they precipitated a war in 1939. Faced with sufficient firmness, potential aggressors have always paused. Firmness does not in itself provide solutions of the underlying problems, but it does increase the readiness of ambitious nations to seek solutions by negotiations rather than by force.

The North Atlantic Area: The mutual assistance provisions of Article 5 of the North Atlantic Pact will apply to the territory of any of the parties in Europe, North America, and the Algerian departments of France; and to the occupational forces of any party in Europe, as well as to the Atlantic Ocean north of the Tropic of Cancer. It may be enlarged as other states become parties to the agreement.

Membership in the Pact: The original signers of the Pact will be Belgium, Canada, France, Luxembourg, the Netherlands, Norway, the United Kingdom and the United States, and also Denmark, Iceland, Italy and Portugal if they wish to sign. In addition, the text of the proposed treaty provides that the parties may, by unanimous agreement, invite any other "European state in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area" to become a party to the Pact.

Various considerations make it impossible to contemplate all or part of Germany now becoming a member of the North Atlantic Pact. The question of Spain's participation in the Pact is a matter for decision by all the members, most of whom do not now consider that Spain should be included.

If any other European countries which do not become original signatories indicate an interest in the North Atlantic Pact, inviting them to accede would be a decision to be taken by the members as a group in conformity with Article 10.

Organization: The Pact provides for the setting up of a council on which each of the parties will be represented and directs that the council "shall be so organized as to be able to meet promptly at any time". The council itself is required to "set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defense committee which shall recommend measures for the implementation of Articles 3 and 5".

Duration of the Agreement: The North Atlantic Pact contains no time limit. It provides that after ten years, or at any time thereafter, the parties may review the treaty to determine whether any changes would be desirable in the light of the international situation at the time and the progress made in developing, through the United Nations, methods of assuring international security on both a universal and a regional basis. It provides also that after twenty years any nation may withdraw from the treaty after giving one year's notice.

After signature, and ratification through the constitutional processes of the individual countries, instruments of ratification will be deposited with the United States Government. The treaty will come into force when the ratifications of the majority of the signatories, including Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom and the United States, have been deposited. For the other signatory states, and for those states which become parties at a later date, the treaty will come into effect on the date of the deposit of their individual ratifications.

The Atlantic Pact and the United Nations

The Pact and the United Nations Charter: The Atlantic Pact is a collective self-defense arrangement among countries of the North Atlantic area who, while banding together to resist armed attack against any one of them, specifically reaffirm their obligations under the Charter to settle their disputes with any nations solely by peaceful means. It is aimed at coordinating the exercise of the right of self-defense specifically recognized in Article 51 of the United Nations Charter. It is designed, therefore, to fit precisely into the framework of the United Nations and to assure practical efforts for maintaining peace and security in harmony with the Charter.

Article 51 of the United Nations Charter recognizes that the member governments have "the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security". Such measures, however, are to be reported immediately to the Security Council, and do not in any way affect the authority and responsibility of the Security Council "to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

Article 5 of the Treaty specifically provides that measures taken by the parties as a result of an armed attack on one of them shall immediately be reported to the Security Council and shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

The primary responsibility for maintaining international peace and

security rests with the Security Council. The obligations undertaken by the parties to the Atlantic Pact do not affect their obligations under the Charter and are subject to present and future obligations with respect to actions taken by the United Nations "to maintain or restore international peace and security". Article 7 of the Pact explicitly states: "This Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibilty of the Security Council for the maintenance of international peace and security". In other words, everything done by the parties under the Treaty must be done in accordance with their obligations under the Charter, the provisions of which, wherever applicable, are paramount.

Comparison with the Rio Pact: While the North Atlantic Pact and the Rio Pact are both collective arrangements within the framework of the United Nations, they differ in certain respects. They are similar in that an armed attack against one of the parties is to be considered an armed attack against all the parties, and both provide for consultation in the event of any situation threatening the security of the parties. The chief differences are these: (1) The Rio Pact contains voting provisions with respect to the decision of the organ of consultation, this organ being the Meetings of Ministers of Foreign Affairs of the American Republics which have ratified the Pact, or the Governing Board of the Pan-American Union which may act provisionally as an organ of consultation until a Meeting of Ministers can take place. The Atlantic Pact does not contain such voting requirements. (2) The Rio Pact specifies the measures which the organ of consultation may agree upon. Each party of the Atlantic Pact agrees to take "individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area". (3) The Rio Pact has specific provision for procedures to be followed in the case of conflict between parties to the Pact. The Atlantic Pact does not contain such a provision.

In contrast to both the Rio and Atlantic Pacts, the mutual assistance treaties the Union of Soviet Socialist Republics has made with her satellites are bilateral in character and by their language are directed primarily against renewal of German aggression. The way in which these arrangements are related to the United Nations Charter is not clear. They contain no specific reference to Article 51 of the Charter, and the connection with the United Nations is given in vague and generalized phrasing. The Bulgarian–U.S.S.R. treaty of March 18, 1948, for example, merely states that: "The present Treaty will be implemented in accordance with the principles of the Charter of the United Nations Organization".

Added Strength to the United Nations: The Atlantic Pact is designed to help bring about world conditions which will permit the United Nations to function as contemplated at the San Francisco conference. The expectation that the cooperation among the great powers pledged during the war and reflected in the Charter would be continued has not been realized. The most important of the peace settlements have not been agreed upon, and, largely because of Soviet obstruction and abuse of the veto, the United Nations has not yet become so fully effective in achieving collective security as had been hoped.

Since the signing of the Charter it has become progressively clearer that serious misconceptions prevail in the minds of the leaders of the Soviet Union concerning Western civilization and concerning what is possible and what is impossible in the relations between the Soviet Union and the world at large. A major contribution which the United Nations and which United States foreign policy can make is to dispel these misconceptions by means consistent with the Charter.

In the field of international relations efforts of the Western powers to reach agreements providing genuine solutions for many of the most important postwar problems have thus far proved fruitless because of Soviet intransigence. Nonetheless, the parties to the North Atlantic Pact solemnly and specifically reaffirm their obligation under the Charter to settle any international dispute by peaceful means and in such a manner that peace, security, and justice are not endangered. In the Pact they pledge themselves anew to strive toward that end.

The North Atlantic Pact speaks in clearly understandable language. It defines the security of the North Atlantic area and the consequences of infringement upon that security. It should thereby enhance the likelihood of reaching peaceful solutions to pending problems by making clear the consequences of resort to force.

Under existing conditions the purposes and principles of the United Nations Charter will be advanced exactly to the extent that the Pact may be able to strengthen the security of the peoples in the North Atlantic area. Its relation to the objectives of the United Nations Charter was summed up in these terms by Warren R. Austin, United States Ambassador to the United Nations:

> The North Atlantic pact provides most persuasive evidence that aggression is unwise and that peaceful collaboration is the course that should henceforth be adopted.
>
> Emphasis should be placed on the character of the action that is proposed. The aim is to discourage aggression by showing a firm determination to resist armed attack. Its character is defensive. Its object is peace. . . .
>
> The use of force provided for by this pact is of the same character as that provided for by the United Nations Charter; namely, to prevent war. It promises prompt resistance by interposing collective force against an aggressor nation.
>
> Conclusion of the North Atlantic pact would reduce the likelihood of war. It would increase the prospects of

peace. It would help us turn to a major task of the United Nations—the substitution of pacific settlements for armed conflict.

The Atlantic Pact and United States Policies

President Truman's "Point Three": President Truman's Inaugural Address was both a statement of American principles and a program of action, a reaffirmation of the policies which have guided the United States in world affairs and a selection of the means to be used to make those policies most effective. The four major courses of action he announced are dependent one upon the other and all of them depend upon the day-to-day execution of the whole body of United States foreign policy which expresses the character, the way of life and the intent of the American people. The principles which have led to the great actions of the United States in the past are those which now give power and moral substance to the cooperation the United States looks forward to establishing with the other countries of the North Atlantic area. The people of the United States, the President declared:

> . . . believe that all men have a right to equal justice under law and equal opportunity to share in the common good. We believe that all men have the right to freedom of thought and expression. . . .
>
> The American people desire, and are determined to work for, a world in which all nations and all peoples are free to govern themselves as they see fit and to achieve a decent and satisfying life. Above all else, our people desire, and are determined to work for, peace on earth—a just and lasting peace—based on genuine agreement freely arrived at by equals.

The third of the four major courses of United States action outlined by President Truman was directed squarely at a peace "based on genuine agreement freely arrived at by equals". Principle and method were tied clearly together.

> . . . we will strengthen freedom-loving nations against the dangers of aggression.
>
> We are now working out with a number of countries a joint agreement designed to strengthen the security of the North Atlantic area. Such an arrangement would take the form of a collective defense arrangement within the terms of the United Nations Charter.
>
> We have already established such a defense pact for the Western Hemisphere by the treaty of Rio de Janeiro.
>
> The primary purpose of these agreements is to provide unmistakable proof of the joint determination of the free countries to resist armed attack from any quarter. Each country participating in these arrangements must contribute all it can to the common defense.
>
> If we can make it sufficiently clear, in advance, that any armed attack affecting our national security would be met with overwhelming force, the armed attack might never occur.

Cooperation for World Peace: The United States has vigorously supported the United Nations and the related agencies. In his Inaugural Address President Truman stated again the determination of the United States to continue to search for ways to strengthen their authority and increase their effectiveness. This determination has led and will continue to lead to practical action—aid to the war-devastated areas, aid to Greece and Turkey, the effort to secure agreement on the international control of atomic energy, the European Recovery Program, cooperation in establishing the Organization of American States, the proposal for a cooperative world program of technical assistance and the joint action in protecting the security of the North Atlantic area. These actions are based on the assumption that each member of the United Nations is obligated to observe in all of its relations with other countries the principles it pledged itself to support when it signed the Charter.

Security Arrangements: United States policy recognizes that the United Nations is not yet the perfected instrument of world security. The United Nations was founded on the premise of great power cooperation. Its structure is therefore such that, if any one great power is unwilling to cooperate, it can seriously impede efforts for peace within the organization. Soviet obstruction in the United Nations, with excessive use of the veto, and Soviet failure to live up to its obligations under the Charter have prompted members which are active in support of the purposes and principles of the Charter to take steps to assure the freedom and independence of certain members of the United Nations. The United States has taken part in some of these actions and has given support, both moral and material, to others. President Truman's message to Congress on March 17, 1948, referred specifically to the Brussels Pact:

> . . . This development deserves our full support. I am confident that the United States will, by appropriate means, extend to the free nations the support which the situation requires. I am sure that the determination of the free countries of Europe to protect themselves will be matched by an equal determination on our part to help them to do so.

This policy of support was given a broader context three months later when on June 11, 1948, the United States Senate, by an overwhelming vote, recommended:

> Progressive development of regional and other collective arrangements for individual and collective self-defense in accordance with the purposes, principles, and provisions of the Charter.
>
> Association of the United States, by constitutional process with such regional and other collective arrangements as are based on continuous and effective self-help and mutual aid, and as affect its national security.
>
> Contributing to the maintenance of peace by making clear its determination to exercise the right of individual or collective self-defense under article 51 should any armed attack occur affecting its national security.

World Wars I and II demonstrate that the security of the United States is directly related to the security of Western Europe and that the nations on both sides of the North Atlantic are bound together by a natural community of interests. The Atlantic Pact is a formal acknowledgment of this relationship and reflects their conviction that an armed attack can

be prevented only by making clear in advance their determination collectively to resist such an attack if it should occur. Such a collective security arrangement is necessary, in the view of the United States, to protect the North Atlantic community and its own security.

By enabling its members to confront a potential aggressor with preponderant power—military, economic, and spiritual—the Atlantic Pact will help to restore the confidence and sense of security which are essential for full economic and political stability. Its political, psychological, and military values are each important and, in fact, inseparable. By reducing the chances of war, by increasing confidence and stability, and by providing the basis for effective collective defense should it be necessary, the Pact can aid materially in establishing in Western Europe the atmosphere necessary for economic recovery and bring closer the fuller life which is possible in a cooperative world society adjusted to the peaceful uses of modern scientific and technical advances.

The ability of freedom-loving peoples to preserve their independence, in the face of totalitarian threats, depends upon their determination to do so. That determination, in turn, depends upon the development of healthy political and economic life and a genuine sense of security. A belief in this power of self-determination led the United States to embark upon a policy of assisting Greece and Turkey through the Greek and Turkish Aid Program, and later, the European countries through the European Recovery Program. The United States is now contemplating entry into the North Atlantic Pact as a means of giving effective support in the area of collective security to the purposes and principles of the United Nations as set forth in the Charter. If the American people approve this step, the Government's objective will be the same as the one on which United States policies now converge, the restoration to international society of the conditions essential to the effective operation of the machinery of the United Nations and the progressive attainment of the objectives stated in the United Nations Charter. In the words of President Truman:

> We are moving on with other nations to build an even stronger structure of international order and justice. We shall have as our partners countries which, no longer solely concerned with the problem of national survival, are now working to improve the standards of living of all their people. . . .
>
> Slowly but surely we are weaving a world fabric of international security and growing prosperity.

The Atlantic Pact and U. S. Security

Discussions of the security functions of the North Atlantic Pact by United States representatives have emphasized the following considerations: The security of the United States would again be seriously endangered if the entire European continent were once more to come under the domination of a power or an association of powers antagonistic to the United States. Continental Europe was lost to the Allied Powers in World War II before the United States became an active participant. It was regained at great risk and at an enormous loss of lives and expenditure of material and money. Today, the weakened condition in which the nations of Europe find themselves as a result of the destruction and privation of war has afforded a golden opportunity for a new aggressor. It is clear in this case—as it is clear, in retrospect, in the case of Nazi Germany—that dominance of the European continent, once attained and consolidated, could be the first step in a larger plan of attack on Great Britain and then on the United States and the rest of the Western Hemisphere The problems created by this possibility of progressive and sustained aggression are legitimately the concern of United States security planning. The maintenance of the freedom and independence of the countries of Western Europe is of pre-eminent importance. It is believed essential to the security of the United States, therefore, that it consolidate the friendships and support which it now enjoys from free and friendly nations, and that thereafter it should seek through peaceful means to reduce the area within which any aggressor can effectively apply pressure.

The last two great wars have proved that a major conflict in Europe would inevitably involve the United States. The North Atlantic Pact, it was pointed out, is designed to give assurance that in case of such a war there will be a coordinated defense in which the actual military strength and the military potential of all the members will be integrated into a common strategic plan. Article 4 provides that the parties to the Pact shall consult when the territory, independence, or security of any of them is threatened; Article 5 insures assistance to any party subject to armed attack. The last war proved clearly that an aggressor nation can best achieve its results by picking off democratic countries one by one, dividing and splitting these countries through propaganda and other tactics so that they are incapable of coordinated defense. The essence of the North Atlantic Pact is that this is not to happen again with respect to the signatory countries.

These preventive and defensive actions have a vital significance for United States security, but they do not by any means overshadow the broad, constructive security actions which are enjoined by the Pact. The United States and its people believe that the most certain and effective security action open to any nation is a cooperative effort, through the United Nations and other avenues of negotiation, to eliminate war and the conditions which lead to war. This policy finds expression in Article 2 of the North Atlantic Pact:

> The Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being. They will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them.

Department of Legislation

Harry W. Jones, Editor-in-Charge

■ The only change in its rules of procedure voted by the House of Representatives at the inception of the 81st Congress was an amendment to House Rule XI (2) (c), concerning the procedure to be followed in securing House action on resolutions referred to the Committee on Rules. This rules change was widely discussed in the newspapers and current periodicals as a "democratization of House procedure", but there seems to have been no effort, prior to the present article, to discuss the issues raised by the amendment in the full working context of House organization and procedure.

The author of this article, John O'Brien, of the New York Bar, is exceptionally well qualified by knowledge and experience for a technical explanation and critical analysis of the January 3 amendment to Rule XI (2) (c). Mr. O'Brien served with great distinction as Assistant Legislative Counsel to the House of Representatives from 1927 to 1942. In the course of his service for the House, Mr. O'Brien's assignments included not only the drafting of legislation and the preparation of committee reports, but also the consideration of many questions concerning the procedure by which bills can be brought to the floor of the House for action. During his fifteen years in the Office of the Legislative Counsel, Mr. O'Brien won the respect and warm personal confidence of the House leaders and other members with whom he was associated, and he has maintained his active interest in legislative matters since his entry into private law practice in New York City.

The 81st Congress and the House Committee on Rules

by John O'Brien

■ One of the first actions of the House of Representatives of the 81st Congress was the adoption of a new rule providing machinery to bring to a vote in the House public bills favorably reported by a legislative committee. The new Rule XI (2) (c) provides that if the Rules Committee fails to report a resolution providing for the consideration of such a bill within twenty-one days after reference of the resolution to the Rules Committee, the chairman of the legislative committee favorably reporting the proposed legislation may move the adoption of the resolution by the House. The House can then vote on the question whether the legislation shall be considered and by the method set forth in the resolution providing for consideration.

The competition for consideration of legislative bills in the House is fierce. The propositions are too numerous and the time is too short to have all bills considered at the length their proponents consider necessary for them to be adopted on their merits, and their opponents consider necessary for them to be killed. Hence, except for "privileged" bills, which are those which can be called up (generally) at any time, and, even in the case of privileged bills, where their consideration is thought to be dictated by special characteristics, a special order or "rule" is necessary to bring a bill to the floor of the House.

The special rule, then, is a tailor-made rule adapted to the bill, the House schedule, and the political requirements for the consideration of the bill. The Rules Committee has long been entrusted with the function of determining whether a special rule should be granted.

The complaint has been that the Rules Committee has exercised its function of determining the order of business in the House in such a manner as to forbid the consideration by the House of proposed measures with which the Committee's membership is in disagreement, or has granted permission for their consideration only on the Committee's terms. Frequently, it is charged, the terms imposed by the Rules Committee for the granting of a special rule are that policy matters deemed objectionable by the members of the Rules Committee be eliminated from the proposed legislation or modified to meet the Rules Committee's objections. The analogy to the traffic cop has been used by critics of Rules Committee practice—he may determine the priority of those going their several ways, but he cannot prevent some from going, and he must not send others to destinations he chooses, or in other cars.

The new rule adopted by the House on January 3, 1949, permits the House by majority vote on motion of the chairman of the legislative committee, which motion may be made on alternate Mondays in the month, to decide the question whether the proposed order of business shall be followed.

Machinery for this general purpose has been in effect since 1931. In pursuance of a petition filed and signed by members (218, or a majority since 1935), a motion to bring the proposed rule before the House was in order. Such a procedure (not abrogated by the new rule) achieved the result of a majority obtaining its will. But the job of solicitation of signatures was so great that it was seldom used.

The new rule is far simpler and much more expeditious in bringing to a decision of the House the question of the House's consideration of proposed legislation. That certainly is to the good. No committee should be able by its inaction to block the will of the House to act. Nor should the Rules Committee be able to dragoon a majority of the House into accepting its will as to the substance of proposed legislation in order that such legislation be considered

at all. The legislative committee which has considered and favorably reported the bill has had the benefit of its experience and hearings, and its determination of policy must be respected as the most informed and deliberate conclusion on the problem.

The new rule contains every promise of providing better machinery for improvement in the legislative processes of the House if the sole criterion is that the majority shall have its way, and that with the least obstruction. Basically, that is a blessing, for that is what the House stands for—majority rule in the body most closely responsible of all governmental agencies to the will the ballot-box tries to enforce.

The new rule, however, does offer opportunity for abuse. The right of the minority to consider proposed legislation, to be heard upon it, and to point the finger of responsibility, must be respected. (By "minority" here is meant those who are opposed to the legislation and not a party.) The circumstances under which the new rule itself was adopted suggest the possibility of oppressive conduct towards the House minority and require a caution. The rule was adopted by the Democratic caucus, since this was the only opportunity (except for the 218-member petition) to modify the power of the Rules Committee without the approval of the Rules Committee itself, and agreed to by the House without opportunity for debate.

The danger of abuse can lie in the power of the legislative committee, through the motion of its chairman, to bring legislation before the House for consideration in accordance with the rule which the legislative committee has determined is what it wants by way of floor discussion and action. The Rules Committee's traditional traffic-cop status will be undermined if the procedure established by the new rule is regularly and successfully invoked by the legislative committee chairmen, since the practical situation would then be that such matters as time for calling up, division of time for debate, permissibility and scope of amendment, and other important considerations could be determined by the legislative committee. In the traffic analogy, the fellow with the smiling face, driving the big car, full of cuties in the back seat, can get through, notwithstanding the cop and the frustrated other motorists.

This danger can be minimized by the Speaker's power of recognition and the power of the House, disciplined by party or other considerations, to reject or amend the resolution providing for consideration.

The new rule tries to curb a Rules Committee practice which developed under a rule which itself was a revolt against a rule of "Cannonism"—the absolute power of the Speaker to control the order of business. In the light of the history of its predecessors, it can be believed that if this new rule, inaugurated under the wings of an improvement of the democratic process, fails because of its placing responsibility in the wrong place, we may expect a "revolt" against it.

MANUSCRIPTS FOR THE JOURNAL

■ The *Journal* is glad to receive from Association members any manuscript, material, or suggestions of items, for consideration for publication. Preponderantly, our columns are filled with articles planned and solicited by members of the Board of Editors or Advisory Board or written by them; but each issue contains articles selected from those submitted to us by others. With our limited space, we can publish only a few of those submitted; but every article we receive is considered carefully by members of the Board of Editors unless for some reason it is plainly unsuited for our publication. Articles in excess of 3000 words including footnotes cannot ordinarily be considered; exceptions are sometimes made as to solicited contributions. Communications from members on subjects of interest to the profession are invited, and will be published if and when our limited space permits. They should not exceed 300 to 350 words in length; if they do, the Board of Editors may reject or condense. The facts stated and views expressed in any article identified with an individual author are upon his responsibility.

As the work of the Board of Editors is carried on by men who are widely separated in distance and busy in their own professional pursuits, time often elapses before a decision can be made as to whether a proffered article is acceptable and space can be made available for it. We cannot assure that submitted manuscripts not accepted will be returned, although that may usually be done.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.

Corporate Stock Purchase Agreements—Some Tax Pitfalls

■ The death of a shareholder-officer in a closely held corporation often gives rise to serious problems, both from the point of view of the company and its surviving owners, and from the point of view of the decedent's estate. The estate needs funds to pay taxes and other debts and expenses. Yet the decedent's unmarketable stock can only be sold at a substantial sacrifice. Moreover, even if the necessary funds can be raised in other ways, retention of the stock by the decedent's widow and children may be entirely unsatisfactory to all concerned. The company and the surviving owners will be vitally interested in preventing the decedent's stock from falling into the hands of outsiders and also in keeping the management free of control or interference by the decedent's family.

The standard type of stock purchase agreement, funded by life insurance, provides an answer to most of these problems—and raises some others. The corporation agrees to buy the stock at the shareholder's death. The price is usually flexible and is to be determined at the time of purchase on the basis of book value. The company is given a right of first refusal at the same price during the shareholder's lifetime. The purchase obligation is covered by life insurance taken out and owned by the company on the life of the shareholder. The insurance premiums are paid out of company income.

This pattern is of course not the only one. Often the agreement runs between two shareholders each carrying a policy of insurance on the other's life. And sometimes the company is given a right of first refusal at the shareholder's death with the surviving shareholders obligated to purchase any of the stock not taken by the company. This note will be confined to the standard company-purchase plan.

The first question, which has nothing to do with taxes, is the *validity* of the agreement under state law. Can the company purchase its own stock? Is the company bound under a contract which can only be performed if surplus profits are available? See *Topper* v. *Schwartz*, 249 N. Y. 206.

The tax questions inherent in such an arrangement may be divided into two groups: (1) those arising during the lifetime of the shareholder in connection with the payment of the insurance premiums; and (2) those arising at the shareholder's death when the proceeds of the insurance are received by the company and the purchase price of the stock is paid to the decedent's estate.

(1) *Insurance premiums.* The insurance is designed to cover the company's purchase obligation and the company will of course be the owner and beneficiary of the policy. Under such conditions the premiums will not be a deductible expense. I. R. C., Section 24 (a) (4). This statute is the companion to Section 22 (b) (1) which excludes life insurance proceeds from taxable income.

The company might perhaps deduct the premium payments as compensation if the policy were owned by the insured officer. But such an arrangement would be inconsistent with the purchase contract and the purpose which the insurance is designed to accomplish —to provide the company with money to discharge its purchase obligation. Moreover, ownership of the policy by the insured would raise serious estate tax problems. And of course the amount currently deducted by the company as compensation would be taxable income to the insured officer. There is also the risk (where the insured owns the policy) that the premium payments will be treated as dividends rather than compensation, taxable to the insured as shareholder but not deductible by the company. Compare *Paramount-Richards Theatres, Inc.*, v. *Commissioner*, 153 F. (2d) 602.

How will these premium payments affect the company's possible liability under Section 102? This is the statute which imposes a penalty tax on corporations permitting their profits to accumulate "beyond the reasonable needs of the business" for the purpose of avoiding the imposition of taxes on their shareholders. No one can predict with assurance how this statute will be administered and applied. But assuming that it is within the legitimate business purposes of a corporation to protect itself by insurance against the loss of a key executive, and perhaps beyond that to provide for continuity of management through a stock purchase agreement, then these premium payments should not prejudice the company's case under Section 102. Indeed, since the payments will presumably reduce the company's earnings available for dividends, the net effect is more likely to be favorable than otherwise, at least until the annual increase in the cash value of the policy catches up with the annual premium payment.

(2) *Transaction at Shareholder's Death.* When the insured-shareholder dies the insurance proceeds are paid to the company and the purchase contract is thereafter consummated; the company pays the purchase price to the decedent's estate in return for the stock.

First consider the insurance proceeds as such. This money is excluded by Section 22 (b) (1) from the company's gross income, assuming that the policy was taken out originally by the company and was not acquired for value from the insured or some other prior owner. See Section 22 (b) (A). The insurance proceeds will increase the company's book surplus to the extent that they exceed the net cash value of the policy (after premiums) already reflected in surplus. This may provide the commissioner with an argument under Section 102. However, since the proceeds are offset by the company's purchase commitment and are actually paid out for the stock, the company's cash position is not improved; for this reason the risk under Section 102 does not appear to be serious.

From the standpoint of the decedent's estate the insurance proceeds are probably not subject to estate tax. The proceeds are payable to the company, and the decedent neither paid the premiums nor possessed any incidents of ownership in the policy. See Section 811(g). Some risk in this connection arises under the so-called "alter ego" rule of Regulations 105, Section 81.27, where it is suggested that a decedent may be treated as having indirectly paid the premiums on his life insurance "if payment is made by a corporation which is his alter ego". Whether this rule would be applied only where the corporation has no independent business purpose (compare *Higgins* v. *Smith,* 308 U. S. 473) or more generally where the insured is a controlling shareholder, remains to be determined. In any event it seems unlikely that both the insurance and the stock will be subjected to estate tax. Compare *John T. H. Mitchell Estate,* 37 B.T.A. 1. The receipt of the insurance proceeds by the company may enhance the value of the decedent's stock and so be reflected indirectly in the estate tax base. And this will almost certainly be the result where the insurance money is to be taken into account under the purchase contract in determining the price to be paid for the stock.

How will the contract price affect the valuation of the decedent's stock for estate tax purposes? The leading case is *Wilson* v. *Bowers,* 57 F. (2d) 682, holding that the value of stock subject to a purchase option is limited to the option price. This rule may produce a very substantial tax benefit in connection with closely held stock. The contract price is presumably tied to book value (usually before receipt of the insurance proceeds), a figure which takes no account of good will and other factors not reflected in the balance sheet. Note however that the rule of *Wilson* v. *Bowers* is not applicable unless the stock is restricted during the shareholder's lifetime. If he is free to dispose of his stock at anytime prior to his death then the contract commitment in effect at his death will not affect its valuation. *James H. Matthews Estate,* 3 T. C. 525.

The actual purchase transaction should have no tax consequences. The stock will be appraised at the contract price in the decedent's estate and sold without gain or loss. The possible application of Section 115 (g) should, however, be noted. This statute relates to stock redemptions which are "essentially equivalent to the distribution of a taxable dividend". There is a definite risk, if less than all the decedent's stock is purchased by the corporation, that the purchase money will be treated as a taxable dividend. In the usual case, however, the company buys all the decedent's stock. Under such circumstances Section 115 (g) will not be applied. Regulations 111, Section 29.115-9.

This note is intended merely to suggest some of the tax aspects of this very common type of business arrangement. Such contracts and the insurance policies which support them must of course be tailor-made, shaped to fit the requirements of the particular situation. Each will involve its own set of problems, tax and nontax, as to which this note can be nothing more than an introduction.

It is to law alone that men owe justice and liberty. It is this salutary organ of the will of all which establishes, in civil right, the natural equality between men. It is this celestial voice which dictates to each citizen the precept of public reason, and teaches him to act according to the rules of his own judgment, and not to behave inconsistently with himself. It is with this voice alone that political rulers should speak when they command.

—Rousseau, *The Social Contract,* p. 256

Lawyers *in the* *News*

John M. RAYMOND

U. S. Army Photograph

Casper W. OOMS

Graphic Pictures

■ Casper W. Ooms, of Chicago, has been appointed Chairman of the Atomic Energy Commission's Patent Compensation Board, set up by the Atomic Energy Act of 1946 to determine how much will be paid inventors for atomic energy patents.

Mr. Ooms was United States Commissioner for Patents from 1945 to 1947, and served as United States delegate to the London conference on German patents in 1946. He was also a member of the Patent Advisory Panel of the Atomic Energy Commission from 1946 to 1949.

Born in Chicago in 1902, Mr. Ooms was educated at Knox College, in Galesburg, Illinois, and received his law degree from the University of Chicago in 1927. He has been a member of the American Bar Association since 1937, and also belongs to the Illinois State Bar Association, the Chicago Bar Association, the Association of the Bar of the City of New York, the American Patent Law Association, the Patent Law Association of Chicago, and the Law Club of Chicago.

■ "The German people now are beginning to realize the true meaning of a constitution and a constitutional court of last resort." So spoke Col. John M. Raymond upon his retirement March 28 as Legal Adviser to the United States Military Governor and Director of the Legal Division of the Office of Military Government for Germany.

He was reviewing the Legal Division's accomplishment of its objectives under the Potsdam Declaration. The Division was charged with abolition of all Nazi discriminatory laws, removal from public office of Germans who took an active part in the Nazi program or showed hostility to occupation objectives, as well as reviewing war crimes trials conducted in the American Zone of the Occupied Reich. "With the completion of the war crimes cases, we have ended the program which called for retribution and punishment," Colonel Raymond said. 'Now, Military Government is concentrating on the constructive job of leading, guiding and inspiring the German people to develop the democratic processes of their government." He cited the fact that the Bavarian constitutional court has recently declared two laws invalid as an example of a trend toward constitutionalism in Germany. He declared that the German people in the American Zone also enjoy the right of *habeas corpus* and have a system of Military Government courts patterned along the lines of the American judicial system, which follow rules of procedure and evidence similar to those existing in the United States.

Colonel Raymond became Director of the Legal Division in March, 1948. One of the major projects of which he had charge was the reorganization of the military court system of Occupied Germany.

A partner in the Boston firm of Palmer, Dodge, Chase and Davis until he was called to active duty with the Army in 1940, Colonel Raymond plans to return to civil life after nine years of active duty during the present war. He received his Bachelor of Arts degree from Princeton in 1916, and was a captain in the Field Artillery during World War I. He received his law degree from Harvard in 1921. He has been a member of our Association since 1925.

During World War II, he served as Chief of the Brazilian Section in War Department Intelligence, and as G-2 and Chief of Staff of United States Forces in the South Atlantic. He was awarded the Oak Leaf Cluster to the Army Commendation Ribbon for his part in drafting the plans and regulations for the operations of the U. S. Group Control Council in the quadripartite occupation of Germany.

Clarence B. RANDALL

Koehne

■ Elected president of the Inland Steel Company on April 27, Clarence

B. RANDALL, of Chicago, is a graduate of Harvard College and of Harvard Law School and a member of the Michigan Bar.

Born in Newark Valley, New York, in 1891, Mr. RANDALL has been associated with Inland Steel since 1925; he has been a vice president of the company since 1930 and a director since 1935. Before accepting a position with the company, he had practiced law for ten years in Ishpeming, Michigan. He was an infantry captain during World War I.

He is an active civic leader in Chicago and his home community, Winnetka. He was president of the Winnetka Board of Education from 1930 to 1936, and has been a trustee of the University of Chicago since 1936, a member of the Harvard Board of Overseers since 1947, and was a trustee of Wellesley College from 1946 to 1949. He was general chairman of the Chicago Community and War Fund Campaign in 1944, and Director of the National War Fund in 1944-1945.

A vice president of the National Association of Manufacturers since 1946, he is also a member of the Industrial Conference Board, a trustee of the Chicago Natural History Museum, and served as steel consultant to the European Cooperation Administration at Paris in the summer of 1948.

He is co-author of a book, *Civil Liberties and Industrial Conflict*, published in 1938, and has written occasional magazine articles.

A Republican and an Episcopalian, he has been a member of the Association since 1923.

James D. FELLERS

■ Selected as the "Outstanding Young Man of 1948" by the Oklahoma City Chamber of Commerce, James D. FELLERS was presented with a plaque and distinguished service key at a luncheon recently given in Oklahoma City by the Junior Chamber of Commerce. The annual award was given Mr. FELLERS for his "all-around civic activity" during 1948.

Born in Oklahoma City in 1913, he worked his way through the University of Oklahoma, receiving his law degree in 1936. He practiced law in his native city until called to active duty with the Field Artillery in 1941. Due to near-sightedness, which gave the Army some doubt about his qualification for the artillery, he was assigned to the Ninth Technical Air Force Command in the intelligence section. He participated in eight campaigns in the European Theater of Operations, and received a commendation from Gen. Courtney H. Hodges, commanding general of the First Army, and the Bronze Star Award. He left active duty in 1945 as a lieutenant colonel.

He became active almost at once in the Junior Bar Conference, and was the first veteran of World War II to become president of the Conference. Under his leadership, membership in the Conference grew from a war-time low of 2000 to 7000. In 1947, he became the youngest member of the House of Delegates. He has been a member of our Association since 1937.

In addition to his work for the organized Bar, Mr. FELLERS is a member of the Advisory Board of the American Cancer Society and of the Speakers Bureau of the Community Chest, and is Vice Chairman of the Governmental Relations Division of the Oklahoma City Senior Chamber of Commerce. He is also active in the Reserve Officers Association, the American Legion and the Air Reserve Association, the National Foundation of Infantile Paralysis and the Oklahoma Medical Research Foundation. He is also a member of the American Judicature Society, the American Red Cross, the Army and Navy Club, the Oklahoma Bar Association, and the International Association of Insurance Counsel, to mention only a few.

Governments have in general, but two means of overcoming the opposition of the people they govern, *viz.*: the physical force which is at their disposal, and the moral force which they derive from the decisions of the courts of justice. . . . The great end of justice is to substitute the notion of right for that of violence, and to place a legal barrier between the power of government and the use of physical force.

—De Toqueville, *Democracy in America*

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

The *McCollum* Decision and the "Right" To Disbelieve

■ The supporters of the *McCollum* decision were bound to triangulate its philosophy sooner or later. The letter of Samuel D. Menin in your March issue accurately locates it slightly off center in the field which Ben W. Palmer has been plowing so admirably—the field not of constitutional interpretation but of basic attitudes about moral law. Mr. Menin says that "The Supreme Court by the *McCollum* decision has given sanction to the right of all to believe or not to believe. . . ."

The Court did all that and a good deal more. The point of interest is that it could not have done less and still reached the result it did. Before it could begin to develop as a purportedly constitutional principle the notion that the State cannot "aid all religions" it had at least to assume, as Mr. Menin does, that nonbelief is entitled to stand before the State equally with belief.

It seems to be about time to take a close look at this assumption. Mr. Menin himself does not purport to buttress the nonbeliever's freedom of religion beyond saying that it is "good sportsmanship" and "good law as the Supreme Court has indicated". This does not help. We will have to try it ourselves.

If the nonbeliever has a right to his nonbelief, there must obviously be such a thing as a right. A right is a moral power to deal or be dealt with according to justice, which is itself a moral standard. The moral power of *A* binds the will of *B* because the moral standard in the given case vindicates *A*'s position. *A*'s right takes no account of physical power. If *A* has the physical power to coerce *B*, that circumstance adds nothing to his moral power. If *B* has the physical power to frustrate *A*, the right of *A* is not thereby impaired, and *B*'s use of his physical power is a wrong to *A*.

Who sets the standard? Who imposes the obligation to adhere to it? Not the State, for the State is subject to the obligation and its acts may validly be, and always have been, tested by the standard. Not humanity as a whole, for the same reason. The fact that humanity is usually of one mind on basic questions of justice is a matter of perception only. General consent did not create the standard or the obligation and could not override either.

To whom, then, will the nonbeliever appeal as the source of his right? On his own premises, there is no source, and no one has any rights about anything.

In fact, any talk of rights is meaningless unless nonbelief is error. A standard to which all humanity, individually, collectively and in all its organizations, is obliged to adhere and by which its acts are judged must have been imposed on it by some higher—*i.e.*, divine—authority.

No doubt it will be embarrassing for the nonbeliever to find himself appealing to divine authority for his right to play his game of make-nonbelieve. But that is his business, and he may so appeal if he chooses. The real question is how he is to make out his case.

If the case is that divinity itself must forbear from objecting, the nonbeliever is saying, in effect, that he is entitled, as against the source of all rights, not to be penalized for falsely challenging its existence. It is not surprising that no effort is made to rationalize this constraint. The most indomitable of nonbelievers would quail before the precipitous palisades of such an undertaking. They are not to be surmounted by epigrams from Voltaire.

If the nonbeliever's appeal to divinity is merely for protection from the State, it may be allowed in part. Divine authority does not enlist the physical power of the State to coerce the human mind. Hence the interior mental processes of the nonbeliever are secure from State interference.

But the *McCollum* case dealt not with internal beliefs, but with teaching, which is exterior, social action. So the very least that is involved here is the right of nonbelief, as against the State, to propagate itself (or not be propagated against with State assistance, which is the other side of the shield).

The nonbeliever's minimum case, in other words, is that divinity has accorded him a right to be free from State interference in teaching that there is no divinity, hence no source of rights, hence no rights, hence no obligation to preserve, or even respect, social order—or at least that the State must not help anyone who preaches the contrary.

Here again we see no effort to demonstrate that such a right exists, unless we can so characterize the technique of gratuitously asserting that it is so. Before demolishing the position that divinity has thus deprived the State of any right of self-defense against invasion by the ideological barbarians, one would first have to set it up. This I confess myself unable to do. Anyway, Mr. Menin's side has the affirmative. It is their move.

WILLIAM J. BUTLER
New York, New York

Court-Martial Defense Not Appointed by T.J.A.

■ I have read with interest the articles and comments of Col. Archibald King, George A. Spiegelberg, Goodrich M. Sullivan and Kearby Peery, with reference to courts martial and the administration of military justice. I agree with Messrs. Sullivan and Spiegelberg that the appointment of courts martial should be divorced from the chain of command and placed under the Judge Advocate General, as recommended by the American Bar Association Committee, but I cannot let the statement of Mr. Peery that

> A special court martial is usually ordered and directed by the post or regimental commander acting upon the advice of junior officers. As a matter of practical expediency, the trial judge advocate (prosecutor) selects the court. The order by the commanding officer is usually only a formality. A hunt is then instituted by the trial judge advocate to get some mess officer, physical training officer, or similarly untrained and unqualified officer, to defend the accused, and he is appointed as defense counsel. The accused is then convicted.

pass without comment.

Although I have participated in more than five hundred general and special court-martial cases in my four and one-half years of service during and immediately following World War II, and have served as trial judge advocate, law member of general courts, member of special courts, defense counsel and acting staff judge advocate of an infantry division, I have never known of a case where any commander acted upon the advice of junior officers or where the trial judge advocate selected the court or the defense counsel. Quite the contrary, it has been the dominance of courts martial by the appointing authority in many (not all, by any means) cases and the fact that the opportunity exists for so doing, that has prompted the American Bar Association Committee, and those of us who concur with its recommendation, to advocate taking the appointment of courts martial and initial review of their judgments out of the chain of command, but this is a far cry from a charge that the trial judge advocate has anything to do with selecting the court or defense counsel.

That many defense counsel were incompetent cannot be doubted, but this has not been the result of their selection by the trial judge advocate. I have on occasion, while serving as trial judge advocate, recommended to the staff judge advocate the selection of certain officers as defense counsel and that others under consideration not be appointed, but without exception this was done in order to obtain the most competent defense counsel and every recommendation that an officer not be reappointed was occasioned by my opinion, based on actual trial experience, that he was not so well qualified as those whom I recommended.

As a member of the Court-Martial Committee of the Chicago Bar Association and as one who has had considerable court-martial experience, I have given the subject considerable study, and while I am the first to admit that many improvements still need to be made, I am convinced that military justice, as administered by the Army, is essentially fair and that a much higher degree of real justice has been rendered under the court-martial system in effect during and following World War II than in any comparable civilian system of justice. If our civilian justice were to achieve as high a degree of real justice as that obtained under the Army court-martial system, I believe we could feel justly proud of our accomplishments.

MORTON JOHN BARNARD

Chicago, Illinois

Disagrees with Captain Sullivan

■ As a member of the Association and a reserve officer of the Judge Advocate General Corps, I have read with interest the JOURNAL's editorial (August 1948), Col. Archibald King's reply thereto (December 1948), George A. Spiegelberg's response to Colonel King (January 1949) and Goodrich M. Sullivan's letter on page 259 of the February 1949 issue. The articles and letters refer to the findings of the War Department's Advisory Committee on military justice, known as the Vanderbilt Committee, recommending primarily the removal of command influence over the administration of military justice.

This letter is a reply to Captain Sullivan's premise that military justice as previously administered was eminently fair. My own experience as a trial judge advocate, defense counsel and court member during active commissioned service in World War II leads me to disagree with Captain Sullivan's viewpoint.

He states in his letter that "to properly evaluate the provisions relating to military justice and the application thereof approach should be neither from a strictly military point of view nor from a strictly civilian point of view". Does Captain Sullivan mean by this that the military service is of a different caliber from other branches of federal service and therefore requires something different in the line of justice? Or does he mean that the service by its very nature is exempted from constitutional restrictions enforced throughout the land to protect the legal rights of all citizens whether in federal service or not?

Evidently he condones the fact that a "line officer of long standing might well overlook, in the attitude of adherence to rigid discipline, the rights and privileges that to the civilian seem self-evident". It is my feeling that no officer of any experience would care to overlook the rights and privileges of a brother in arms, for to do so would demonstrate a lack of fitness to command. I dare say that many of the successful combat commanders instinctively learned to abandon "rigid adherence to discipline" in the field, and were the more successful for it in maintaining the morale of the men under their command.

A citizen entering the service swears to uphold the Constitution and to obey the commands of superior authority, but he does not in this process swear away any of his constitutional rights and privileges guaranteed him as Captain Sullivan

suggests. It is further suggested that "military justice must always be peculiar unto itself by its very nature". Why? Is our concept of justice for a criminally accused civilian any different for a military person accused of crime? Does the uniform mean that a man is guilty until proved innocent and that he cannot have the safeguards of due process? Must a soldier's attitude toward justice be different than that of the civilian? Is it less important to a soldier to have his liberty, life or property taken from him without fair trial?

Captain Sullivan places too much stock in the competency of staff judge advocates and the policy of such officers to prevent injustice on the part of military commanders who may lack, in their desire to accomplish a military result, patience with the comparative slow motion of determining guilt or innocence. No system of justice, military or civilian, is a just and fair system if it is dependent upon the competency or innate sense of justice of one man, be he judge advocate, trial judge advocate, court member or reviewing authority. A system which provides for a spread of risk to eliminate possible unfairness is the safest and best system.

No matter how competent or well-meaning our military command officers may be, we should not adhere to a system which places the overwhelming responsibility of administering proper justice, affecting the destinies of thousands of men, on the shoulders of an already administratively overburdened command officer. If the system permits the possibility of an injustice being perpetrated, and Captain Sullivan admits such a possibility, through the whim, caprice or military pique of one man who has the power to appoint, instruct and review the findings of a military court, then we do not have the system of checks and balances upon which our whole legal structure is supposedly based.

I agree with Captain Sullivan that military justice "on the whole" was fairly administered, but nevertheless there were grave miscarriages. The same is true for justice as administered on the civilian level. The answer is that we must continue to improve and implement the administration of justice within the spirit and meaning of our basic laws and not be content because "on the whole" the system is functioning fairly well. The divorce of military law from command influence would be one such method of improving the military situation.

We cannot afford to have the soldier's faith in military justice depend on the adequacy of a staff judge advocate alone. The morale of a military establishment, vitally important to the welfare of the nation, must rather depend on the individual's knowledge that he will get fair treatment under the Articles of War regardless of the personal attitudes of superior officers. At present he has no such guarantee.

NAT H. HENTEL
New York University Law Center
New York, New York

An Infamous Example of Judicial Recall

■ The splendid summary as to Theodore Roosevelt's ill-advised proposal for the recall of judicial decisions, contained in Mr. Ben W. Palmer's article in the February JOURNAL, prompts me to suggest that before the record is closed as to that effort to submit judicial decisions to popular vote, one comment should be added.

The world's most famous (or infamous) criminal proceeding was the trial of Christ. And it is also the outstanding incident of a practical application of the recall theory.

It will be remembered that the trial was before Pontius Pilate acting as a duly authorized judge without a jury, and after the presentation of charges and evidence Pilate announced his decision: "I find no fault in this man", and "I find no crime in this man". But the multitude continued to cry out, "Crucify Him, Crucify Him"; the judge finally yielded to the demand of the people and Christ was nailed to the Cross! I submit that this bit of history should never be overlooked if some other person shall hereafter advocate a recall of judicial decisions.

WALTER S. FOSTER
Lansing, Michigan

State Regulation of the Right to Vote

(Continued from page 396)

enrollment books to all individuals, regardless of whether they sought to be enrolled during the regular period. The party also denied the judge's right to open up the party to anyone and everyone, whether or not they believed in the principles of the party. The lawyers also said that the Democratic primary is not a part of the election machinery of the State of South Carolina, and that the Party has the right to fix its own rules of membership and to require that members subscribe to the Party's principles.

As matters now stand, the *Brown* case is to be heard on its merits, presumably at the next term of federal court in the Eastern District. The outcome of that case will determine the extent to which Negroes can participate in Democratic Party affairs but is not expected to alter their already established right to vote in Democratic primaries. That right seems assured, not so much by the Constitution of the United States as by the changed political and judicial complexion of those federal judges charged with interpreting that Constitution.

OUR YOUNGER LAWYERS

Charles H. Burton, Secretary and Editor-in-Charge, Washington, D. C.

Meeting of American Law Student Association Set for St. Louis

■ The first meeting of the American Law Student Association, which is to be sponsored by the American Bar Association, will be held in St. Louis, beginning on Sunday, September 4, 1949, and continuing through Tuesday, September 6, 1949. Arrangements for the meeting are being made by the JBC Committee on Relations with Law Students under the chairmanship of Professor Charles W. Joiner, of the University of Michigan Law School at Ann Arbor.

Since February 1, 1949, the Committee on Relations with Law Students has been actively engaged in carrying out the instructions of the American Bar Association directing them to sponsor an American Law Student Association with a constituent student association in each approved law school. To this end over fifty active members of the Junior Bar Conference have been organized and directed to contact the heads of the various law schools and the heads of the local student bar associations. Reports indicate that the plan is being received with high favor by the school administrators and by the student bodies. Plans are being developed to hold the organizational meeting of the American Law Student Association in conjunction with the September meeting of the American Bar Association in St. Louis. The more than fifty schools already having student associations are expected to have delegates at St. Louis. Many of the other schools have indicated an interest and plan to have representatives present although their local organization may not have been completed by that time.

The tentative organizational outline of the American Law Student Association indicates that it will be an association of local student organizations. The general objectives of the American Law Student Association that are being worked out by representative students in cooperation with the Committee on Relations with Law Students include the following:

1. To acquaint the law students with the nature and activities of the American Bar Association and the local and state bar associations and to foster a closer relationship between the law students and the American Bar Association.
2. To train law students for future participation in the American Bar Association and in local and state bar associations.
3. To make law students conscious of the obligations of lawyers and opportunities existing for lawyers through bar association activities.
4. To introduce students to the professional problems they will have to face after admission to the Bar.

The effectiveness of this program depends in a large measure upon the cooperation given the local student association by the individual members of the Bar. The members of the American Bar Association will be expected to cooperate fully with the law students and participate in the local programs. Many members of the Association have a message that would be valuable to tomorrow's lawyers. They should not wait to be called upon but should volunteer their services to the heads of the local student bar associations. Joint meetings will be planned by local bar associations with the student associations. These meetings should be of an informal type allowing the students to become conscious of the opportunities existing for them to improve the administration of justice through bar association activity and the obligations resting upon their

CHARLES W. JOINER

shoulders to cooperate with lawyers to further this objective.

Professor Joiner has announced the following tentative schedule of events for the meeting of the American Law Student Association:

Sunday, September 4

10 a.m. to 12 noon
Organizational meeting.

12 noon to 2 p.m.
Luncheon with Junior Bar Conference.

2 p.m. to 5 p.m.
Meeting with Junior Bar Conference.

5. p.m. to 7 p.m.
Reception by St. Louis younger lawyers for Junior Bar Conference and American Law Student Association.

Monday, September 5

2 p.m.
Round table on job opportunities. Representatives from labor, business, large city practice, small city practice and teaching.

Tuesday, September 6

9 a.m.
Meeting with Junior Bar Conference.

2 p.m.
Business meeting of American Law Student Association.

8 p.m.
Dinner-dance with Junior Bar Conference.

BAR ACTIVITIES

Editor-in-Charge . . Paul B. DeWitt, Chairman, Section of Bar Activities

■ On Thursday, May 19, 1949, the Bicentennial Commission of Alexandria, Virginia, now celebrating its two-hundredth anniversary, will pay tribute to George Mason, one of Virginia's most famous sons and patriots.

This ceremony, sponsored by the Alexandria Bar Association, has been arranged to coincide with the annual convention of the American Law Institute to be held in Washington from May 19 through May 21.

Arrangements have been made to adjourn the Thursday afternoon session at 5:00 P.M., at which time members of the Bar of the metropolitan area will drive their special guests over the boulevard to Mt. Vernon where the program will be held.

Mt. Vernon has been selected as the site because of the inaccessibility of Mason's home, Gunston, and because, since it is privately occupied, it does not offer comparable entertainment facilities. Certainly there will be no lessening of the occasion's great respect to Mason because Washington's shrine has been chosen. They were proprietors of neighboring estates, were great friends and contributed indelibly to the common cause of freedom and justice.

The entertainment will consist of a brief and appropriate address, followed by a buffet supper. Opportunity will be given the guests to inspect the mansion and grounds.

The guests will include the Justices of the Supreme Court of the United States and of the Virginia State Supreme Court.

■ At the seventy-second Annual Meeting of the State Bar Association of New York, Neil G. Harrison, of Binghamton, was elected President. Mr. Harrison is a past president of the Broome County Bar and of the Federation of Bar Associations of the sixth Judicial District. He previously served on the Executive Committee of the State Association and is Chairman of the Grievance Committee. He is presently a Trustee of the Albany Law School.

Chester Wood, of Albany, was re-elected Secretary, and Robert C. Poskanzer, of Albany, was named Treasurer.

■ The membership of the Louisiana State Bar Association has under consideration adoption of the so-called "Missouri plan" for the appointment of judges in Louisiana. At the 1948 meeting of the Louisiana State Bar Association, held in Lake Charles, the Association's Committee on Selection of Judicial Candidates presented to the convention a report which recommended that the Association approve the proposal of selecting rather than electing various judicial candidates in Louisiana. Following a full discussion of this report, a resolution was adopted approving the plan in principle and directing that the plan in its final draft form be sent to the membership of the Association when prepared.

Acting under this mandate the Committee on Selection of Judicial Candidates, under the chairmanship of Thomas W. Leigh, of the Monroe Bar, on March 7 sent to the members of the Louisiana State Bar Association a draft of the proposed constitutional amendment to place in operation the new procedure for selection of judges.

While the plan has been described as new, it is not novel. The proposal involved was developed as early as

District of Columbia Traffic Court Receives Award

(Left to Right) John Russell Young, President, Board of Commissioners for the District of Columbia; Tom Clark, Attorney General of the United States; Walter M. Bastian, Treasurer, American Bar Association; Chief Judge George P. Brise, of the Municipal Court of the District of Columbia; James J. Bennett, Secretary, Section of Criminal Law of the American Bar Association.

1913, and after many years of debate and discussion the proposal of selection was endorsed in 1937 by the American Bar Association.

The Committee on Selection of Judicial Candidates has closely coordinated its work with that of the Louisiana State Law Institute which is engaged in the preparation of a project of a proposed new constitution and the Institute has approved for inclusion in the proposed new constitution a section covering the selection of judges substantially in accord with the proposal which has been submitted to the Bar Association.

On the agenda of the annual meeting of the State Bar Association, which will be held in Baton Rouge in May, consideration of the proposed selection of judicial candidates will be included and final action is contemplated. Of course, this plan will have to be submitted to the voters of the state in the form of a constitutional amendment before it can be placed into operation.

■ A few years ago, the Traffic Court of Washington, D. C., was the subject of considerable criticism by the public, members of the Bar and committees of Congress. This criticism was aimed at old and overcrowded facilities and inefficient methods. From this criticism grew the determined purpose of the Bar in Washington and the Traffic Court itself to see what could be done to correct the situation. The success of this concentrated effort was proved on March 17 when the American Bar Association, acting through its Section of Criminal Law, awarded the Court first place in its Traffic Court Contest for the year 1947-48.

■ The Alameda (California) Bar Association recently announced a plan to finance CARE to lawyers in European countries. Each member of the local association is to contribute ten dollars which will be forwarded to the American Bar Association's Special Committee on Assistance to Lawyers in War Devastated Countries. In remarking on the project, Harry J. McClean, President of the State Bar of California, said that the plan would result in new hope to those now in distress, and will better the understanding of America by the leaders of thought abroad.

New Headquarters Building

(Continued from page 412)

tional $5.00. The Committee believes that a great majority of the Association will not overlook this item and will become active participants in this project.

Even though a member of the pharmaceutical profession, reading of the new building project, sent in his check for $100.00, the Committee does not at this time wish any members of the Association to do more than take care of the $5.00 item appearing on the dues notice. The reason for this is that at the St. Louis meeting a report will be made and a new plan for patron memberships will be presented.

The response which is made by the membership in this initial move of a rather large undertaking will do much to insure its success.

Restoring Power to Local Governments

(Continued from page 392)

Uniform Laws in preparing and supporting the adoption of uniform legislation and of the American Law Institute in making the "common law, common",[28] has contributed to better government through improving the administration of justice.[29]

5. *Participation in Interstate Compacts.*—While the efforts of a single state in regulating a local phase of what may be termed "interstate problems" may be more destructive than beneficial, states are often able to amiably settle their differences by entering into interstate compacts, thus eliminating any demand or need for interference by the federal government.[30] The example of New York and New Jersey in creating the New York Port Authority is a splendid illustration of what may be accomplished.[31] In the absence of such a compact, a federal agency would have undoubtedly, at some later date, assumed control. It has been proposed that the Constitution be amended[32] to eliminate the restriction against interstate compacts unless approved by Congress. This seems sensible inasmuch as the fear that some of the powerful states would form compacts to the detriment of the smaller ones, although real in 1789, has long since evaporated.

6. *Administrative Cooperation.*—Not only are the states able to formulate policies designed to preserve their place in the federal system, but through cooperative action are frequently able to exert political pressure on their Congressional representatives to honor these policies.

Administrative Cooperation Would Be Helpful, Too

Turning aside, however, from the political aspect we find that the administrative councils operating through the Council of State Governments[33] have sponsored challeng-

28. Labingier, "The Status of the American State," 18 *Temple Uni. L. Q.* 237, 260 (1944).
29. Graves, *American State Governments* (1946), page 918.
30. Frankfurter and Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 *Yale L. J.* 685 (1925).
31. *Id.* at page 701.
32. Carman, "Should the States Be Permitted To Make Compacts Without the Consent of Congress," 23 *Cornell L. Q.* 280 (1938).

ing studies of local and state governments, which only the wealthier states could afford to make independently. Annual regional meetings of governors stimulate cooperation among the states on common problems and eliminate needless competition, retaliatory regulations, and legislation.

The Interstate Assembly[34] studies administrative, executive and legislative activities, seeking to integrate the operation of government as a related whole.

The full use of administrative cooperation by all state governments will not only make it a more useful device, but will tend to strengthen individual states through stimulating its leaders and by providing the necessary "know-how" in performing a more effective job of administration. "Local government," warned Clarence E. Martin, "is just as strong, and is as strong only, as the men behind it."[35]

7. *Removal of Trade Barriers.*—Disregarding the doubtful constitutionality of a state's right to burden interstate trade, it is unwise as a matter of policy because of the ensuing economic and political repercussions.

The interference with interstate trade not only invites regulation by Congress and retaliatory legislation from other states, but also retards the full economic development of the offending state. One only has to review a few pages of colonial history, recounting the effect of the import and export duties imposed by the colonies, to find the disruptive influence on economic life by state interference.

On the other hand the removal of trade barriers does not require the abandonment of all controls over health or safety; it is only discriminatory regulations that need be repealed.

Professor Melder in summarizing the objectives of free trade, asserted:

> Free trade does not require that commerce and transportation are to go unregulated. It requires only that healthful, honestly-represented, economically-useful goods and services shall be admitted into any State or local market with discrimination on account of the location of the producer or the efficiency of his methods of production.[36]

The promotion of free trade is worthy of the best cooperative efforts of all state governments and their political divisions.

8. *Consolidation of Local Government.*—The Bureau of the Census reported 155,067 units of local government in the United States in 1942,[37] an average of one unit for every 850 people and for every nineteen square miles of land. The 155,067 units consisted of 3050 counties, 16,220 municipalities, 108,579 school districts, 18,919 townships, and New England towns, and 8299 special districts.[38]

Illustrative of the types of overlapping of local governments is the example furnished by the State of Illinois, in which there were "190 areas with a three-level structure (county, township, road district or school district) and over 1600 areas with four levels."[39] In all there were 15,854 local governments, an average of 283.4 units per 1000 square miles.[40]

The consequences of overlapping, concluded the Council of State Governments, are wastefulness, tax inequities, political irresponsibility, and the ineffective "citizen control of local institutions."[41] Multiplicity of units, we have learned, tends to destroy local governments at the very points that they need strengthening.

While the pattern for reorganization must consider individual local needs and traditions, the aims of consolidation should be uniform. Local structure, it is generally considered, must be reformed to provide a single local government in an area large enough in wealth and population to maintain effective and efficient services.[42]

9. *Reapportionment.*—If the legislature is to be sensitive to the needs of the people, it must represent the people. Even a token adherence to the principles of democratic government requires the states to re-examine their legislative districts in recognition of shifts in population. Rural areas have been reluctant to relinquish control to the more heavily-populated urban areas, especially when the urban areas have had notoriously corrupt political machines. The states should clean out corrupt urban political machines and then proceed to reapportion districts in conformity with the state constitution. With open discrimination against urban areas, it is no wonder that proposals for the creation of metropolitan regions, independent of state governments, have been offered.[43]

10. *The Stimulation of Public Interest in the Maintenance of Economical, Honest and Efficient Local Government.*—What may be accomplished when public interest is sufficiently stirred is exemplified in a recent incident that happened in Indiana. Addressing a resolution to their Congressional delegation, the Indiana Legislature declared:

> We Hoosiers, like the people of our sister State, were fooled for quite a spell with the magician's trick that a dollar taxed out of our pockets and sent to Washington will be bigger when it comes to us. We have taken a good look at said dollar. We find it has lost weight on its journey to Washington and back. . . . We know that there is no wealth to tax that is not already within the boundaries of the forty-eight States.[44]

More than four decades ago Samuel Orth, in a paper attacking the inefficiency of the then state legislature, proclaimed: "Political evils feed upon the indifference of the people. Popular demand is the ultimate source of good law; popular indifference is the immediate source of bad law."[45]

33. Graves, *supra* note 29, at page 908.
34. *Id.* at page 966.
35. Martin, *supra* note 9.
36. Melder, "Trade Barriers and State Rights," 25 A.B.A.J. 307, 308; April, 1939.
37. The Council of State Governments, "State-Local Relations," page 183 (1946).
38. *Id.* at page 184.
39. *Id.* at page 185.
40. *Id.*
41. *Id.* at page 195.
42. *Id.* at page 182.
43. Graves, "The Future of American States," 30 *Am. Pol. Sci. Rev.* 24, 45 (1936).
44. New York *Times*, February 15, 1948, page 1, column 4.

By their control of the ballots, the people ultimately determine the question of Congressional policy. They will make the final determination of whether or not our federal system is to be preserved.

Role of the National Government in Restoration of Powers to States

Notwithstanding that the United States Supreme Court's decisions, extending the power of the national government through a liberal construction of the "commerce clause" and "welfare clause" of the Constitution, have been long and bitterly resisted, the national government's disputed powers have been sustained and made a part of our constitutional law. In determining the part that the national government is to play in restoring powers to the states, we can, for the most part, eliminate the Supreme Court. A contemporary constitutional authority has pointed out that, "The scope of state authority has become a question of governmental policy, and has largely ceased to be one of constitutional law."[46]

While there has been a tendency in the present Supreme Court to construe the Fourteenth Amendment favorably to the states, it is too late to argue state rights in terms of constitutional law.

We do not ask nor would we want the Court to redecide the whole body of law that has grown from the federal-state disputes.

The responsibility of restoring powers to the state and local governments presently rests with the legislative and executive branches of the national government. The policy that they must follow if the federal system is to be preserved, although difficult to administer, may be simply stated.

1. The executive branch, operating through its administrative agencies, is to relinquish powers involving state matters as the states assume their duties and responsibilities. The decrease in functions is as a matter of efficient management to be followed by a reduction in personnel in the federal agencies. The tendency of the national government to expand its functions, resulting from the inclination of power to extend itself, will be effectively counteracted. The executive branch must, through the Bureau of the Budget, be alert to see that no new duties, local in nature, replace old ones, a practice that has recent precedent.

2. The Congress must curtail the grant-in-aid program and other such federal spending. When there are programs that must be carried on by the federal government, involving in any manner local affairs, the national government is to furnish financial aid without attempting control over local matters. The interference of the national government in the local affairs of the states is incompatible with our federal system of government.

3. The members of Congress must divorce themselves from local interest and devote their attention to the promotion of the "general welfare" in the broader sense of the term. "It must be remembered," said Justice Holmes, "that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great degree as the courts."[47]

Courageous Action Is Needed To Effectuate Recommendations

The foregoing recommendations call for drastic action by courageous leaders of state and local governments. It cannot be successfully refuted that forceful action is required to disestablish powers lodged in the national government for a quarter of a century. The highest type of courage is required to refuse federal financial assistance and to insist upon honest, economical and efficient state and local governments.

While the states are financially able to assume new functions[48] and to muster support from a populace weary of federal regulation, they should make their bid for the restoration of responsibilities and powers. To fail now is to fail forever.

45. Orth, "Our State Legislatures," in *Readings on American State Government*, page 41 at 56 (1911).

46. Dodd, *supra* note 3 at page 84.

47. *Missouri, K. & T. Ry. v. May*, (1904) 194 U.S. 267, 270.

48. The functions of a state government are not within the scope of this discussion. For an excellent discussion see, Orfield, "What Should Be the Functions of the States in Our System of Government," 29 A.B.A.J. 480; September, 1943.

Judge Metzger and the Military

(Continued from page 368)

the fine by pardon.

Duncan and *White* were full-dress cases. They went to the Supreme Court and were there decided February 25, 1946. Mr. Anthony, the able counsel for plaintiff Duncan has discussed the cases fully in 57 *Yale L. Jour.* 27 (November, 1947). Justice Black wrote the majority opinion. The Justice held that the Organic Act under which the Territory of Hawaii was organized, did not authorize the Governor, or any one by his authority, to close the civil courts. Chief Justice Stone concurred specially.[5] Justice Burton dissented, and Justice Frankfurter joined in the dissent. Fred Patterson and E. J. Botts were attorneys for White.

Judge Metzger's opinion in these cases is to be found in 66 F. Supp. 976 (1944). Judge McLaughlin wrote the opinion of the District Court in the *White* case, 66 F. Supp. 982 (1944). The reversal in the Court of Appeals of *Duncan* and *White* is to be found in 146 F. (2d) 576 (1944); *certiorari* granted February 12, 1945, with the result stated above.

Duncan was a war worker who became intoxicated and engaged in a fist fight with two Marines. The Provost Court sentenced Duncan to six months in prison.

White was a broker, who in August, 1942, was sentenced by a Provost Court to five years for

5. Chief Justice Stone, concurring specially, was impressed that the military found it possible to open the saloons on February 4, 1942. The Chief Justice said:

> . . . trials of petitioners in the civil courts no more endangered the public safety than the gathering of the populace in saloons and places of amusement, which was authorized by military order. 327 U.S. 337.

embezzlement of a client's securities. This sentence had been reduced to four years.

General Richardson[6] and Admiral Nimitz both took the stand in the *Duncan* case, and I want to quote from the General's testimony. Mr. Ennis' representation of General Richardson was able, and Mr. Anthony's cross-examination was masterful.[7]

DIRECT EXAMINATION

Q. Now, General, turning to the subject of the provost courts, which Counsel has mentioned, will you state how you perceive the provost courts to be part of the military security system?

A. Well, in order to enable me to discharge my responsibilities under this modified form of martial law, and in order to achieve the security which is the only reason really for the prevalence and existence of the modified form of martial law here, I am concerned, as a soldier, with my duties of security. We have been obliged to publish regulations for the control of firearms, for the control of ammunition, for the illegal possession of radios, for the illegal possession of cameras, for the institution of the curfew, for the institution of the blackout, for the ejection of undesirables from restricted areas. In order to enforce those regulations, I must have at my disposal some sort of tribunal to that effect.

• • •

A. . . . the violation of any of those offenses would have to be referred to a civil court for trial, with its concomitant delay. The military are the ones that detect these offenses. The military hold the witnesses, as a rule, and therefore we cannot brook a delay. And there must also be in the punishment a certain measure of retribution. The punishment must be swift; there is an element of time in it, and we cannot afford to let the trial linger and be protracted.

• • •

. . . In an area of this character, the Hawaiian group, which is an active theatre of war and which is in the theatre of operations, it is inconceivable that the Military Commander should be subjected for the enforcement of his orders to the control of other agents.

CROSS-EXAMINATION

Q. Is it a fact that the high tide in Japanese aggression was reached in the battle of the Coral Sea and in Midway in the Pacific?

A. I believe this, that the Japanese came down to Midway with those transports and with that navy with the idea of seizing Midway, occupying it as a jumping off place for the occupation of these islands. And, therefore, when they were defeated at Midway, their chance of organizing this oceanborne force, of which we have been just talking, failed; and from that day to this, they have never been able to recuperate sufficiently to warrant them taking the risk. But they have the capability if they want to take it. It may not be as strong as they would like to have it.

• • •

Q. General Richardson, getting down to the business of this case, I would like to have your views as to why, what is the military reason that requires the trial of what is an offense under the laws of the United States, of assault and battery, down in the provost court? What is the military reason?

• • •

Q. What I am trying to get from you is, why do you think we have got to have the provost courts? You first said that on account of the delays of the civil courts. Is that one of your reasons?

A. That is one reason, yes.

• • •

Q. Well, is there anything else besides the delays of the civil courts?

• • •

Q. One of the things you said was that you had to have some instrumentality to enforce your orders?

• • •

A. But, as I said, . . . I would still have to go before the courts, the civil courts, which is objectionable when the offenses are of this character that rest upon security. And you place the Commander, then, of the area under the control of other agents for enforcement of his regulations when he has the responsibility of security. Are you going to take the responsibility for the security of these islands? Is the Court going to take the responsibility for the security of the fleet? Is Governor Stainback going to take the responsibility for the security of the fleet? No. I have it. And, nor my conscience, nor my duty will ever make me say that I don't need the authority that goes hand in hand with my authority.

Q. You make no distinction between the trial and conviction of a non-military offense and your mission as a soldier to defend these islands and to project the offensive to the west?

A. All of these incidents, including this one, are integrated in that general security program. We cannot make those refinements and distinctions when we have those responsibilities. And you would take away from me and weaken my authority.

Q. Do you think that would interfere with the progress of the war?

A. I do, most decidedly.

[The testimony above was given on April 11, 1944]

Spurlock's Conviction Is Reversed

Spurlock was a Negro. Judge McLaughlin's opinion discharging him from custody appears in 66 F. Supp. 997 (1944). Spurlock had been sentenced by the Provost Court to five years for assaulting a police officer. The defendant was placed on probation and got into other trouble. For that he was sentenced to five years "at hard labor". This was reduced to two and one-half years. The opinion by the Court of Appeals reversing this case is to be found in 146 F. (2d) 652 (1944). Spurlock was "pardoned" by the Military Governor on February 3, 1945, *after* certiorari *had been granted by the Supreme Court.* Brahan Houston (by appointment of the Court) was attorney for Spurlock.

I have not mentioned the abuse and threats the Judge and his family underwent. I attach an exchange of letters between Judge Metzger and General Richardson on this subject. (See Appendix I.) For my personal tribute to Judge Metzger, I must call on Damon Runyon. I think Damon would have put the Judge on his preferred list: "He is the gamest little guy I ever met".[8]

6. General Richardson criticized the District Court decisions in "detention" cases in Pennsylvania and Massachusetts. The decisions were by Judge Ganey in Philadelphia, *Schueller* v. *Drum*, 51 F. Supp. 383 (1943), and Judge Ford in Boston, *Ebel* v. *Drum*, 55 F. Supp. 186 (1944). I entitled Judge Ganey's and Judge Ford's decisions "Courage" in *Notes of a District Judge* (1948) 12.

7. O.M.G. (Office of Military Governor) called important clients of Mr. Anthony to headquarters and asked them "If they knew what their lawyer was doing". Anthony carried the *Duncan* case to the Supreme Court.

8. I have called Judge Metzger "Another Coke". *Notes of a District Judge* (1948) 8.

After the first recoil, the Bar of Hawaii rallied to their good Judge, as strong Bars can always be expected to do. Some of Hawaii's best lawyers contributed their services and money towards getting a case into the Supreme Court in order to settle the important constitutional questions that were at stake. This, as I think I have made plain, was only accomplished in the face of determined effort by the Army (to all appearances with the cooperation of the Department of Justice) to keep *any* case from getting to the Supreme Court.

Attorney Anthony has pointed out in 31 *Calif. L. Rev.* 477, 479, n.9, that the form of military government set up in Hawaii was apparently the same that had been devised for use in occupied countries abroad. The point of view of the Islanders is that they are a state in all but name, and that the Army may be expected, unless the Supreme Court's decision has checked their plans, *to set up the same form of government in all or part of our states, in the event of atomic war.*[9]

Judge Metzger and others were disappointed that a Congressional investigation of the Army's attitude towards the courts was not held. The Judge himself declined to prepare an article for the AMERICAN BAR ASSOCIATION JOURNAL, although requested by the Editors to do so. I am a poor substitute. When there was a flurry towards an investigation by Congress, Secretary of War Patterson wrote to the Congressional committee:

> The Army did not in any sense oust or overthrow the civil government of the Territory. The civil authorities of the Territory continued for the most part to function as before, their authority supported and assured by martial law.

This statement is criticized by Mr. Anthony in 57 *Yale L. Jour.* 51, 52. One hundred eighty-one General Orders were issued by the Military Government between December 7, 1941, and March 10, 1943.

Judge McLaughlin, who after going on the bench in March 1943, stood staunchly by his colleague, summarized the cases in an address delivered before a society in Honolulu. This is to be found in 92 *Cong. Rec.* A4930-1.

Going back to Secretary Patterson's statement, I recall a remark by President Truman, when he was Chairman of the Senate Committee on the Conduct of the War. President Truman, then Senator, said, "The Army never changes. It covers up".[10]

9. The following is from a letter by President Wilson to Senator Overman, regarding a proposed bill to divide the country into military districts during World War I:

My dear Senator:

Thank you for your letter of yesterday. I am heartily obliged to you for consulting me about the Court-Martial bill, as perhaps I may call it for short. I am wholly and unalterably opposed to such legislation . . . . I think that it is not only unconstitutional, but in its character it would put us upon the level of the very people we are fighting. . . . It would be altogether inconsistent with the spirit and practice of America . . . I think it unnecessary and uncalled for . . . .

WOODROW WILSON

10. I have stayed away from the social and political questions involved. An observer wrote:

The Army authorities went into a kind of partnership with the larger industrial concerns, sugar and pineapple plantations, public utilities, contractors, etc., and laid down rules to freeze labor in fixed jobs, hours, days, and wages. Profit making industries were well cared for and were well satisfied—at least all articulate industry—and, with the mercantile and commercial class, was made very prosperous. The Chamber of Commerce and the press were rapturous over the situation.

Aspects of the Islands' economy are discussed fully by Chief Judge John Biggs, of the Third Circuit, in a recent opinion, *International Longshoremen's and Warehousemen's Union* et al., v. *Walter D. Ackerman, Jr.* et al., Civil Nos. 828 and 836, 82 F. Supp. 65.

The Army deemed it important "to control labor". "Absenteeism" was made a crime. The military prosecuted a great many cases. The usual fine for absenteeism was five dollars.

At the peak of the war there were about 500,000 civilians in the Islands and about the same number of military. One-third of the civilians were of Japanese blood.

APPENDIX I

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

August 27, 1943

Chambers of
Delbert E. Metzger, Judge

Lt. General, Robert C. Richardson, Jr.,
Commanding General, Hawaiian Department,
Fort Shafter, Hawaii

My dear General:

I request that while you have your hand in at General Orders you enunciate an order forbidding your officers to further annoy me by threats and abuse.

For the past several days my family and I have been repeatedly disturbed by telephone calls, during dinnertime and until late into the night, by persons representing that they are Army officers or friends of General Richardson, desiring to tell me the kind of a disloyal citizen and skunk they have concluded I am. Their vilifications and occasional threats are not particularly distressing to me personally, but to shield members of my family I have made it a recent practice to answer the telephone myself in the evenings and I dislike to be called from dinner, studies and slumber by intoxicated zealots who either refuse to give their names or indistinctly describe themselves as Army officers of various ranks, who desire to tell me that I am all wet and numerous other things that are much less complimentary, even threatening to do me bodily injury on sight.

Last evening at dinnertime I was called to the telephone by some person describing himself as Lt. Roger St. John who excitedly told me that I should be ashamed of myself and should be horse-whipped and that he would be glad to do it, on account of what he concluded to be my lousy opposition to his General.

I am quite sure that you fully understand that I have not the slightest quarrel with you, General, nor personal resentment toward any thing or act your deliberate judgment dictates you should do as Military Commander—not even though I should believe you were mistaken in your judgment or followed immature advice. You and I both have our offices and duties to perform and will, I am sure, give our careful and righteous efforts to that end.

I fully realize that you may not be able to prevent everyone of your many officers from doing ungentlemanly and indecent things at times, but it has occurred to me that you may be able to influence some who have inclinations for disturbances by appropriate orders in this regard, now that this situation is called to your attention.

Very sincerely,
/S/ DELBERT E. METZGER

* * *

HEADQUARTERS HAWAIIAN DEPARTMENT
OFFICE OF COMMANDING GENERAL
FORT SHAFTER, T. H.

27 August 1943

Honorable Delbert E. Metzger,
United States District Court,
District of Hawaii,
Honolulu, T. H.

My dear Judge Metzger:

I beg to acknowledge the receipt of your letter of August 27, 1943, and regret that you have been annoyed by telephone calls and threats, but you will appreciate that I have no control over such matters.

I am reluctant to believe that such calls could have been made by army personnel, but I shall have the alleged charge against Lieutenant Roger St. John investigated.

Very truly yours,
/S/ ROBERT C. RICHARDSON JR.
ROBERT C. RICHARDSON, Jr.,
Lieutenant General, U. S. Army,
Commanding Hawaiian Department
Military Governor of Hawaii.

* * *

RESTRICTED

HEADQUARTERS HAWAIIAN DEPARTMENT
OFFICE OF THE DEPARTMENT COMMANDER
FORT SHAFTER, T. H.

29 August 1943

AG 015.3
Subject: Habeas Corpus Proceedings.
TO : Distribution "A".

1. It has come to the attention of the Department Commander that Judge Delbert E. Metzger of the United States District Court has been subject to some annoyance by telephone calls from various persons who apparently were in disagreement with his action. Some of these calls allegedly have been made by members of the Army.

2. The Department Commander wishes most emphatically to bring to the attention of the command that the proceedings in question are of a judicial nature. There is no question of personalities involved. The proceedings are merely a matter of legal procedure and must be viewed by the Army in such a light.

3. It is therefore enjoined upon all members of this command that they refrain from injecting into the proceedings any personal feelings, if such be the case, and from any criticism of the personalities involved, if such is taking place.

By command of
Lieutenant General RICHARDSON:
/S/ O. N. THOMPSON,
O. N. Thompson,
Colonel, AGD,
Adjutant General.

RESTRICTED

* * *

United States District Court
District of Hawaii
Chambers of
Delbert E. Metzger, Judge

Honolulu, Hawaii
Sept. 2, 1943

Lt. General, Robert C. Richardson, Jr.,
Commanding General, Hawaiian Department,
Fort Shafter, Hawaii.

My dear General:

I thank you for your courtesy in the matter on which I wrote you on August 27th. Since then I have had no further cause to complain.

Sincerely yours,
/S/ DELBERT E. METZGER

* * *

APPENDIX II

Excerpt from Judge Metzger's opinion in the Glockner *and* Seifert *cases—not previously published*:

The writ of habeas corpus is an ancient and highly prized remedy by which the legality of the detention of one in the custody of another may be tested judicially, and it has existed in the United States from the time this nation became independent. In many situations it is the only possible means known in the law for obtaining relief from persecutions.

Anyone who has read the Declaration of Independence of the original thirteen United States in Congress on July 4, 1776, will recognize the public need for it, particularly in turbulent times. The Constitution of the United States gave it prominent sanction and preserved it as a part of our system of government, forbidding its suspension, "unless when in cases of rebellion or invasion the public safety may require it". The Constitution does not supply the words "or in imminent danger thereof". A similar provision was contained in the Constitution of the Republic of Hawaii, and similar provisions are contained in the Constitutions of most states, some going further and forbidding absolutely the suspension of the writ, without any exception.

Here in Hawaii it has for many years been a frequently used procedure, as the laws of Hawaii prescribe it as the appropriate means for the recovery of children unlawfully detained, whether by a divorced parent or

others. It also lies for obtaining the release of persons detained on pretext of their insanity, disease, or helplessness, and many other coercive detentions.

APPENDIX III

Excerpt from General Order No. 31, New Series, dated August 25, 1943—the new series of General Orders began March 10, 1943:

GENERAL ORDER NO. 31, PR. 2.08:

Neither the Honorable Delbert E. Metzger, Judge, District Court of the United States in and for the Territory of Hawaii, nor any other judge of the said District Court of the United States in and for the Territory of Hawaii, shall make or issue, or order, direct, or cause to be made or issued, any process, mandate, summons, citation, order, decree, decision, determination, direction, or action in or relative to, or arising out of, by reason or because of, that certain habeas corpus proceedings now pending in the District Court of the United States in and for the Territory of Hawaii substantially styled or entitled as follows: "In the Matter of the Application of Walter Glockner," and bearing file or identification number or mark "H. C. 295," in the office of the Clerk of the District Court of the United States in and for the Territory of Hawaii. The said Delbert E. Metzger, Judge, District Court of the United States in and for the Territory of Hawaii, forthwith and immediately shall stay, refrain from, cause to be stayed, and desist from, all pending or further action or proceedings in said habeas corpus proceedings, or in any matter, action, or proceedings arising out of, related to, or in any way connected with, such pending habeas corpus proceedings. . . .

PR. 5.01:

Any judge of the District Court of the United States in and for the Territory of Hawaii, any United States Marshal or Deputy United States Marshal in and for the Territory of Hawaii, or any other public officer, deputy of such other public officer, public employee, or any other person, who directly or indirectly, expressly or impliedly, in any manner, shape, or form, shall violate, attempt to violate, evade, or attempt to evade, or aid, assist, or abet, in any violation of, any provision of this General Order, upon conviction thereof by a Provost Court, heretofore or hereafter appointed by the Military Governor of the Territory of Hawaii, shall be punished by confinement, with or without hard labor, for a period not to exceed five (5) years, or by a fine not to exceed five thousand dollars ($5,000.00), or by both such confinement and fine, or if convicted thereof by a Military Commission heretofore or hereafter appointed by the Military Governor of the Territory of Hawaii shall be punished as such Military Commission shall determine.

Nominating Petitions

Alabama

The undersigned hereby nominate William Logan Martin, of Birmingham, to fill the vacancy in the office of State Delegate for and from the State of Alabama for the term ending with the adjournment of the 1950 Annual Meeting:

Wm. McLean Pitts, John Randolph Smith, A. M. Pitts, John W. Lapsley, M. Alston Keith and A. T. Reeves, of Selma;

Calvin Poole and D. M. Powell, of Greenville;

T. Julian Skinner, Jr., R. G. Kilgore, Jr., W. W. Bankhead, Herman W. Maddox and Bohdan Hallas, of Jasper;

Ed Leigh McMillan, of Brewton;

W. H. Albritton, Albert L. Rankin and Robert B. Albritton, of Andalusia;

W. H. Mitchell, H. A. Bradshaw and Geo. E. Barnett, of Florence;

Ira D. Pruitt and Marcus E. McConnell, Jr., of Livingston;

L. J. Tyner, Jacob A. Walker and N. D. Denson, of Opelika.

Idaho

The undersigned hereby nominate William S. Holden, of Idaho Falls, for the office of State Delegate for and from the State of Idaho, to be elected in 1949 for a three-year term beginning at the adjournment of the 1949 Annual Meeting:

Henry S. Martin, Errol H. Hillman, John L. Bloem, Paul T. Peterson, Arthur W. Holden and Ralph L. Albaugh, of Idaho Falls;

J. L. Eberle, Eugene H. Anderson, E. A. Weston, O. W. Worthwine, Willis C. Moffatt, Grant L. Ambrose, R. H. Copple, Charles F. Koelsch, R. W. Beckwith, Clarence L. Hillman, Karl Paine and James H. Hawley, of Boise;

Wm. S. Hawkins, of Coeur d'Alene;

L. Ivan Jensen, of Shelley;

Donald R. Good and John W. Jones, of Blackfoot;

S. T. Lowe and A. H. Nielson, of Burley;

Merle L. Drake, of Challis.

Indiana

The undersigned hereby nominate Frank C. Olive, of Indianapolis, for the office of State Delegate for and from the State of Indiana to be elected in 1949 for a three-year term beginning at the adjournment of the 1949 Annual Meeting:

Telford B. Orbison, of New Albany;

John M. McFaddin, of Rockville;

Carl M. Gray, of Petersburg;

Aaron H. Huguenard, Eli F. Seebirt and Milton A. Johnson, of South Bend;

L. L. Bomberger and Richard P. Tinkham, of Hammond;

Phelps Darby, Frank H. Hatfield and Joseph H. Iglehart, of Evansville;

Walter B. Keaton and John H. Kiplinger, of Rushville;

Kurt F. Pantzer, Herbert E. Wilson, John K. Rickles, Eugene C. Miller, Frederick E. Schortemeier, Perry E. O'Neal, Hubert Hickam, James A. Ross, Edward B. Raub, Jr., Edmund W. Hebel, Alan W. Boyd and Ralph B. Gregg, of Indianapolis.

Nevada

The undersigned hereby nominate John Shaw Field, of Reno, for the office of State Delegate for and from the State of Nevada to be elected in 1949 for a three-year term beginning at the adjournment of the 1949 Annual Meeting:

Wm. Woodburn, Wm. J. Forman, Bert M. Goldwater, Thomas O. Craven, George L. Vargas, Morley Griswold, Anthony M. Turano, H. H. Atkinson, Miles N. Pike, Roger T. Foley, Lloyd V. Smith, Bruce R. Thompson, H. W. Edwards, John S. Belford, George Springmeyer, John P. Thatcher, Oliver C. Custer, Axel P. Johnson, Arther F. Lasher, I. A. Lougaris, Thomas F. Ryan, G. B. Tapscott, N. H. Samuelson, J. T. Rutherford and Virgil H. Wedge, of Reno.

Oregon

The undersigned hereby nominate James C. Dezendorf, of Portland, to fill the vacancy in the office of State Delegate for and from the State of Oregon, for the term ending with the adjournment of the 1949 Annual Meeting, and Robert S. Maguire, of Portland, to be elected in 1949 for a three-year term beginning at the adjournment of the 1949 Annual Meeting:

Lee A. Ellmaker, E. Earl Feike, Chas. R. Spackman, Jr., R. R. Bullivant, Hugh L. Barzee, MacCormac Snow, W. B. Shively, Thaddius W. Venness, Joe P. Price, Stephen W. Matthieu, Peter A. Schwabe, Henry Bauer, John Gordon Gearin, Edward J. Clark, George B. Campbell, Herbert L. Swett, Andrew Koerner, Alfred H. Corbett, F. M. Sercombe, Walter H. Evans, Jr., Robert W. Gilley, Hugh L. Biggs, James P. Rogers, Charles E. McCulloch and Omar C. Spencer, of Portland.

Utah

The undersigned hereby nominate Sam D. Thurman, of Salt Lake City, for the office of State Delegate for and from the State of Utah, to be elected in 1949 for a three-year term beginning at the adjournment of the 1949 Annual Meeting:

Joseph S. Jones, Athol Rawlins, Sidney Neff Cornwall, R. J. Hogan, Calvin A. Behle, D. A. Skeen, Wm. M. McCrea, C. C. Parsons, John D. Rice, Frank A. Johnson, Rex J. Hanson, Paul B. Cannon, Irwin Arnovitz, Leonard S. Ralph, Edgar C. Jensen, Edward F. Richards, Harley W. Gustin, Albert R. Bowen, Geo. A. Critchlow and C. W. Wilkins, of Salt Lake City;

Lewis J. Wallace and Ira A. Huggins, of Ogden;

George S. Ballif, I. E. Brockbank and A. Sherman Christenson, of Provo.

West Virginia

The undersigned hereby nominate Frank C. Haymond, of Charleston, for the office of State Delegate for and from the State of West Virginia to be elected in 1949 for a three-year

term beginning at the adjournment of the 1949 Annual Meeting:

James Lee Thompson, of Hurricane;

James B. Riley, of Wheeling;

Harry H. Byrer, L. I. Rice and J. O. Henson, of Martinsburg;

Robert W. Lawson, Jr., J. Horner Davis, II, W. M. Woodroe, Chas. G. Peters, Hawthorne D. Battle, Robert S. Spilman, Sr., and H. L. Snyder, of Charleston;

F. Paul Chambers, of Logan;

Paul S. Hudgins, of Bluefield;

Ira J. Partlow, of Welch;

Kemble White, Harold M. Garrett, James C. McManaway, Lawrence R. Lynch, James M. Guiher, Chesney M. Carney, Haymond Maxwell, Jr., George W. McQuain, Howard L. Robinson and Stewart McReynolds, of Clarksburg.

The Courts and Tax Administration

(Continued from page 372)

at clarification was made by the Treasury in T.D. 5488 of 1945, and a second in T.D. 5567 of 1947.

Notwithstanding these efforts, it remains impossible to predict with reasonable accuracy the income tax status of many trusts. In scores of decisions the lower courts have grappled with the problems, and deficiencies proposed by the commissioner are today awaiting trial on which the grantor is charged with tax liability far in excess of his own income and any of the trust income which may be made available to him.

Clifford Decision Ignores Language of Statute

In making its decision in the *Clifford* case, the Supreme Court was of course activated by the wish to have the tax law reflect the Court's conviction as to the right result in the case before it. Yet Congress, author of the tax law, had in its own way dealt with the problem before the Court. Code Sections 166 and 177, then in force, enacted as Section 219 of the Revenue Act of 1924, provided for the taxation of trust income to the grantor under certain carefully specified conditions. In 1934 however Congress had rejected Treasury recommendations for the inclusion of a provision specifically taxing to the grantor income of short term trusts. The Court in supplying such provision, necessarily vague in its application, was taking over the function of Congress.

That view was expressed by Justice Roberts in his dissenting opinion as follows:

> If judges were members of the legislature they might well vote to amend the act so as to tax such income in order to frustrate avoidance of tax but, as judges, they exercise a very different function. They ought to read the act to cover nothing more than Congress has specified.

Adherence to Statute Approved by Courts

In theory, the judges generally recognize that it is their function to apply the words of the statute enacted by Congress in the manner indicated by Justice Roberts, so as not to add to or subtract from them according to their views as to the desirable results. Justice Frankfurter has said ("Some Reflections on Reading of Statutes", Lecture before the Association of the Bar of the City of New York, March 18,1947):

> . . . where policy is expressed by the primary law-making agency in a democracy, that is by the legislature, judges must respect such expressions by adding to or subtracting from the explicit terms which the lawmakers used no more than is called for by the shorthand nature of language.

Perhaps it is in the "shorthand nature" of language that justification is found in practice for wide departure from what seem to be the explicit terms of the statute, and denial of what the Supreme Court once referred to as a "literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion".

In the *Gregory* case, Judge Hand put the basis of free interpretation as follows (69 F. (2d) 809, 810):

> . . . the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes,

and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.

How great has been the tendency of recent years for courts to depart from adherence to statutory language has been strikingly put by Justice Jackson, who has said (34 *A.B.A.J.* 535, 538; July, 1948):

> The custom of remaking statutes to fit their histories has gone so far that a formal act, read three times and voted on by Congress and approved by the President, is no longer a safe basis on which a lawyer may advise his client, or a lower Court decide a case. This has very practical consequences to the profession. The lawyer must consult all of the committee reports on the bill, and on all its antecedents, and all that its supporters and opponents said in debate, and then predict what part of the conflicting views will likely appeal to a majority of the Court. Only the lawyers of the capital or the most prosperous offices in the large cities can have all the necessary legislative material available. The average law office cannot afford to collect, house and index all this material. Its use by the Court puts knowledge of the law practically out of reach of all except the Government and a few law offices.

With taxation such a vital factor as it is today to business planning, it is of great importance that advance determination can be made of the tax effect of proposed transactions. The Treasury has a stake in that predictability, perhaps as great as that of the taxpayer, for in the long run what yields most revenue is smooth and orderly transaction of business. There is little justification for the assumption that Congress will always assert maximum tax liabilities. Concessions in taxation may be as advisable as concessions in prices.

Statute Should Replace Judicial Legislation

Instead of judicial law-making in dealing with tax statutes, dependable rules of construction should be utilized to ease the burdens on the courts and the mind of the taxpayer. These rules should include the simple canons, once widely favored, that the statute must be taken as it stands without addition or subtraction; that where the statute is unambiguous the courts cannot seek elsewhere for legislative intent; that the courts cannot change the meaning by supplying omissions or inserting something not already in the statute. The use of elaborate consideration of legislative history, even if not entirely excluded as it is in England, should weigh little against the actual wording of the statute.

Danger that the Revenue Code will be unduly expanded by express provisions setting doubts at rest is nothing to the uncertainty that without such provisions the taxpayer must be left to wander dazed through an ever-expanding multitude of court decisions.

Return to Congressional statutes can be obtained only if the courts have a change of attitude. It is a striking part of judicial history that the judges of the Supreme Court did experience such a change as to the interpretation of constitutional limitations—the notable change of the latter thirties and the early forties, which so largely freed the legislative power of Congress.

It is strange that the very time when the High Court was freeing Congress from limiting constitutional interpretations, it was limiting the legislative power by wide extension of statutory interpretation.

Experts Should Fashion Tax Legislation

As part of the change on the Court on constitutional limitations, the power of administrative tribunals was recognized as expanded, this for the reason that in view of the complexity of the subjects of regulation detailed rules can best be formulated by experts. Tax legislation pre-eminently demands fashioning by experts. Those responsible for the formulation of legislation must have before them the broad consequences of provisions, which the courts looking at the effect of a particular case only can hardly take into account. An implied limitation upon statutory language which may appeal to the Court as desirable in a particular case to accomplish a desired result, if applied in other cases not then before the Court, may defeat the legislative purpose.

As in the thirties the call to the Court was "back to the Constitution", the call must now be "back to the statute". Left free, Congress is likely to be more alive to its primary responsibility and more careful in draftsmanship. Confined to the statute, the Treasury will be more predictable in administration.

If courts refrain from legislating they will still have ample function in seeing that neither the Treasury nor the taxpayer is mistreated under the statute. What is essential is that Congress be left to write the law and that the Treasury be subject to review in its enforcement. Some day the vigorous dissents by Justice Roberts in favor of adherence to the statute may come to be as highly regarded as dissents of Justice Holmes favoring adherence to the language of the Constitution.

Tax administration will remain confusing until tax statutes are clear and the courts give them firm adherence. From the courts we now need stress on fidelity rather than on philosophy.

Classified

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